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Punitive Damages: A Comparative Analysis

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Punitive Damages: A Comparative Analysis

John Y. Gotanda

Abstract

In light of expanding international trade, it is increasingly likely that politicians, courts and tribunals will wrestle with whether punitive damages are appropriate in transnational disputes, and whether countries that traditionally do not allow exemplary relief should recognize and enforce foreign awards of such damages. Furthermore, by seeing how different systems address these problems, we can gain a deeper understanding of the role of punitive damages in our own legal system and be better able to deal with punitive damages issues in the international arena. This Article undertakes a thorough comparative study of punitive damages in common law countries. It examines the laws of England, Canada, Australia, New Zealand and the United States to determine whether there exists a consensus on the availability of punitive damages. The Article finds that, despite the controversy over the appropriateness of punitive damages, they are widely available in these countries and claims for such damages have increased in recent years. It also finds, however, that there is little consensus on the factors that are used to determine the amount of punitive damages that should be awarded. Some jurisdictions provide little or no guidance to the judge or jury who sets the award. Others provide a detailed list of factors, and one country even provides damages brackets to guide the decision maker in fixing the amount of punitive damages. The Article concludes that all countries have taken steps to rein in unreasonably large punitive damages awards. Those steps vary greatly from country to country, as do the standards for determining what constitutes an excessive award.

Punitive Damages: A Comparative Analysis

John Y. Gotanda¹

I. INTRODUCTION

The past decade has witnessed increasing controversy over the award of punitive damages.¹ Today, punitive damages are available in a wide variety of actions,² and awards have increased in frequency and size.³ The primary arena for this controversy is the United States. There, between 1996 and 2001, the annual number of punitive damages awards in excess of \$100 million doubled.⁴ In 2001 alone, over \$162 billion in

1. Associate Dean for Research, Professor of Law and Director, J.D./M.B.A. Program, Villanova University School of Law.

1. In *TXO Produ. Corp. v. Alliance Res. Corp.*, Justice O'Connor pointed out: As little as 30 years ago, punitive damages awards were "rarely assessed" and usually "small in amount." Recently, however, the frequency and size of such awards have been skyrocketing. One commentator notes that "hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." And it appears that the upward trajectory continues unabated.

TXO Produ. Corp. v. Alliance Res. Corp., 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) (citations omitted).

2. See, e.g., *Cassell & Co., Ltd. v. Broome*, [1972] 1 All E.R. 801, 802 (H.L.) (upholding award of exemplary damages in defamation action); *Goodman v. Kidd*, [1986] N.W.T.R. 94 (S.C.) (holding exemplary damages were properly awarded because defendant's libel was clearly vindictive, insolent and high-handed); *Kolewaski v. Island Properties, Ltd.*, [1983] 56 N.S.R.2d 475 (S.C.T.D.) (awarding exemplary damages for "high-handed, reckless and persistent" conduct); *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81 (C.A.) (holding exemplary damages are recoverable in New Zealand in defamation actions under certain circumstances); *Moore v. Slater*, [1979] 101 D.L.R.3d 176 (B.C.) (ruling punitive damages were appropriate because defendant's conduct was clearly "high-handed and malicious"); *Karpow v. Shave*, [1975] 2 W.W.R. 159 (Alta. Sup. Ct. T.D.) (upholding award of punitive damages for assault); *Lackersteen v. Jones*, 92 F.L.R. 6 (1988) (awarding exemplary damages for, *inter alia*, false imprisonment); *Vorvis v. Insurance Corp. of British Columbia* [1989] 1 S.C.R. 1085, 1104-05 (noting that punitive damages may be awarded in any case where the defendant's conduct has been harsh, vindictive, reprehensible or malicious and adding that it may be awarded in certain breach of contract cases).

3. See Stephen Daniels & Joanne Martin, *Myth and Realty in Punitive Damages*, 75 MINN. L. REV. 1 (1990); see also *Thompson v. Commission of Police of the Metropolis*, [1998] Q.B. 498 (C.A.); *John v. MGN Ltd.*, [1997] Q.B. 586 (C.A.).

4. See RICHARD L. BLATT, ET AL., *PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE* 12, 17 (2003). In fact, the study reports that in 1992, there were no punitive

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punitive damages were awarded at trial or affirmed on appeal.⁵ Indeed, the amount of some awards are staggering: in *Pennzoil Company v. Texaco, Inc.*, the jury assessed \$10 billion in punitive damages.⁶ However, this proliferation of punitive damages has not been limited to the United States. For example, in England, a Law Commission Report stated that awards of punitive damages have become unpredictable and uncontrollable.⁷

Issues concerning punitive damages now arise in international disputes. Arbitrators deciding cases under the auspices of the Society of Maritime Arbitrators have awarded punitive damages in actions involving transnational contracting parties.⁸ In *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, an arbitral panel is to decide whether Mississippi court proceedings that resulted in awards of \$100 million in compensatory damages and \$400 million in punitive damages violated Chapter 11 of the North American Free Trade Agreement.⁹

Not surprisingly, large punitive damages awards have generated much debate in the United States and in the international community.¹⁰

damages awards in excess of \$100 million, but in 2001, there were 16 such awards. *Id.* at 12. See also Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 239 (Mar.-Apr. 1996) (noting that \$327 million in punitive damages were awarded by 75 of the most populous U.S. counties).

5. See BLATT, *supra* note 4, at 12.

6. See *Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1 (1987). The largest reported punitive damages award was in *Engle v. R.J. Reynold Tobacco*, No. 94-08273 CA-22 (Fla. Cir., Dade Co., 2000), where the jury awarded \$145 billion in punitive damages. That award, however, was later overturned on appeal. See *Liggett Group, Inc. v. Engle*, 2003 WL 21180319 (Fla. Dist. Ct. App., May 21, 2003).

7. See Law Commission Report 247, *Aggravated, Exemplary and Restitutionary Damages* (Dec. 16, 1997) ["Law Commission Report"]; see also *John v. MGN Ltd.*, [1997] Q.B. 586 (C.A.) (noting that damages awards, including punitive damages, had become "so large as to bear no relation to the ordinary value of life").

8. See, e.g., *Octonia Trading, Ltd. v. Stinnes Interoil GmbH*, SMA No. 2424 (1987) (awarding \$100,000 punitive damages where respondent wrongfully stole its petroleum cargo from the ship's bunkers and used it to fuel the ship); *Triumph Tankers, Ltd. v. Kerr McGee Ref. Corp.*, SMA No. 2642 (1990) (awarding treble damages of \$368,495.55 to the claimant under RICO (the applicable law) on the ground that the respondent had converted part of the claimant's petroleum cargo).

9. See *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, available at <http://www.state.gov/s/l/c3755.htm>.

10. See *Symposium: Private Law, Punishment, and Disgorgement*, 78 CHI-KENT L. REV. 3 (2003); *Symposium: Reforming Punitive Damages*, 38 HARV. J. ON LEGIS. 469 (2001). For a discussion over the appropriateness of such damages in international commercial arbitration, see

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While many commentators have written on the validity and propriety of punitive damages,¹¹ few have subjected them to comparative study. Such study is essential. Courts and arbitral tribunals increasingly wrestle with punitive damage claims in transnational disputes, which often involve the laws of divergent legal systems. Furthermore, by seeing how different systems address these problems, we can gain a deeper understanding of the role of punitive damages in our own legal system, and become better able to deal with the issues they raise in the international arena.

This Article is the first effort to engage in a thorough comparative study of punitive damages. It begins with an overview of the subject and then examines both doctrine and practice in five common law countries: England, Australia, New Zealand, the United States, and Canada. The Article finds that, despite the controversy over the appropriateness of punitive damages, they are widely available in these countries. Indeed, England recently expanded the types of cases in which punitive damages can be claimed. It also finds, however, that there is little consensus on the factors that are used to determine the amount of punitive damages that should be awarded. Some jurisdictions provide little or no guidance to the judge or jury who set the award, others provide a detailed list of factors, and one jurisdiction even provides damage brackets to guide the decision

M. Scott Donahey, *Punitive Damages in International Commercial Arbitration*, 10 J. INT'L ARB. 67 (Sept. 1993); International Dispute Resolution Committee, International Law & Practice Section, New York State Bar Association, *Report on Punitive Damages in International Commercial Arbitration* (Jan. 1992). For a discussion of whether countries that do not permit awards of punitive damages would recognize and enforce foreign awards of such damages, see Volker Behr, *Punitive Damages in American and German Law – Tendencies Toward Approximation of Apparently Irreconcilable Concepts*, 78 CHI-KENT L. REV. 105 (2003); Ernst C. Stiefel et al., *The Enforceability of Excess U.S. Punitive Damage Awards in Germany*, 39 AM. J. COMP. L. 779 (1991).

11. See generally Theodore Eisenberg, et al., *Juries, Judges and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation)*, 107 YALE L.J. 2071 (1998); A. Mitchell Polinsky, *Are Punitive Damages Really Insignificant, Predictable and Rationale? A Comment on Eisenberg et al*, 26 J. LEGAL STUD. 663 (1997); Susannah Mead, *Punitive Damages and the Spill Felt Round the World: A U.S. Perspective*, 17 LOY. L.A. INT'L & COMP. L.J. 829 (1995); Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence Measured Remedies*, 40 ALA. L. REV. 831 (1989); Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of Rationale*, 40 ALA. L. REV. 741 (1989); J. McMahon, *Exemplary Damages: A Useful Weapon in Legal Armory?*, 18 VICTORIA U. OF WELLINGTON L. REV. 35 (1988); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); Jane Mallor & Barry Roberts, *Punitive Damages: Towards a Principled Approach*, 31 HASTINGS L.J. 639 (1980); David G. Owen, *Punitive Damages in Product Liability Litigation*, 74 MICH. L. REV. 1257 (1976).

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maker in fixing the amount of punitive damages. The Article concludes that all countries have taken steps to rein in unreasonably large punitive damages awards. Those steps vary greatly from country to country, as do the standards for determining what constitutes an excessive award. Thus, the law and practice of punitive damages remain country-specific and have not been harmonized by globalization.

II. OVERVIEW

Punitive damages, also called exemplary damages, are “sums awarded apart from any compensatory or nominal damages, usually . . . because of particularly aggravated misconduct on the part of the defendant.”¹² Punitive damages are of ancient origin. Examples can be found in the Code of Hammurabi,¹³ the Bible,¹⁴ the laws of the Babylonians, the Hittites and ancient Greeks¹⁵ and the Hindu Code of Manu.¹⁶

The most generally accepted justifications for punitive damages are to punish and deter certain conduct,¹⁷ particularly willful or malicious

12. DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 204 (1973) (citing *RESTATEMENT OF TORTS* § 908 (1939)). See CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 275 (1935). Punitive damages differ from aggravated damages. Aggravated damages are compensatory in nature, awarded when high-handed conduct increases the injury to the plaintiff. Aggravated damages are often awarded “for injury caused to the plaintiff’s feelings caused by insult, humiliation and the like.” *Lamb v. Cotogno* (1987) 164 C.L.R. 1, 8. By contrast, punitive damages are intended to punish. However, the distinction between the exemplary and aggravated damages is not always clear as commentator notes: “‘Aggravated damage’ indicates that the loss to the plaintiff is increased and can therefore only have reference, or lead on, to compensatory damages; but ‘aggravated damages’ is ambiguous in this respect and could refer equally to compensatory damages and to exemplary damages.” HARVEY MCGREGOR, *MCGREGOR ON DAMAGES* 151 n.1 (14th ed. 1980).

13. *CODE OF HAMMURABI* § 8, reprinted in 1 ALBERT KOCOUREK & JOHN WIGORE, *SOURCES OF ANCIENT AND PRIMITIVE LAW* 391 (1915).

14. See *Exodus* 22:1, 9 (King James).

15. See H.F. Jolowicz, *The Assessment of Penalties in Primitive Law*, in *CAMBRIDGE LEGAL ESSAYS* 205-06 (1926)).

16. See *The Laws of Manu* in 1 ALBERT KOCOUREK & JOHN WIGMORE, *supra* note 13. See also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 25 (1991) (Scalia, J., concurring) (providing history of punitive damages). For a discussion of punitive damages in ancient Jewish texts, see Elliot Klayman & Seth Klayman, *Punitive Damages: Toward Torah-Based Reform*, 23 *CARDOZO L. REV.* 221, 228-40 (2001).

17. See *Smith v. Wade*, 461 U.S. 30, 54 (1983) (“Punitive damages are awarded . . . ‘to punish [the defendant] for his outrageous conduct and to deter others like him from similar conduct in the future.’” (quoting *RESTATEMENT (SECOND) OF TORTS* § 908(1) (1979)); see also 1 LINDA J.

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conduct.¹⁸ Courts and commentators have asserted that these damages also serve other functions.¹⁹ Specifically, they “vent the indignation of the victimized,”²⁰ discourage the injured party from engaging in self-help remedies,²¹ compensate victims for otherwise uncompensable losses,²² and reimburse the plaintiff for litigation expenses that are not otherwise recoverable.²³

There is no consensus among countries on the availability of punitive damages. As a general rule, however, punitive damages are not available in civil law countries in private actions, but are available in many common law countries.

Most civil law legal systems limit recovery of damages in private actions to an amount that restores a party to its pre-injury condition.²⁴ In these countries, punitive damages are considered to be a penal sanction that may be imposed only in criminal proceedings.²⁵ In fact, the prohibition on an award of punitive damages in civil actions may be considered by some of these countries to be a matter of fundamental public policy. As a result, they may refuse to recognize and enforce a foreign

SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 2.2(A)(1) (4th ed. 2000) (“The most frequently stated purpose of punitive damages is to punish the defendant for his wrongdoing and to deter him and others from similar misconduct.”).

18. See Mallor & Roberts, *supra* note 11, at 648; see also David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373-74 (1994).

19. See *Symposium: Reforming Punitive Damages – The Punitive Damages Debate*, 38 HARV. J. ON LEGIS. 469, 470-71 (2001).

20. Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1320-21 (1993).

21. See Ellis, *supra* note 11, at 3-9.

22. See Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520 (1957); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1686 n.11 (2001); see also Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003).

23. See Ellis, *supra* note 11, at 3.

24. Among the civil law countries that permit recovery of only compensatory damages in private actions are Argentina, Belgium, Bolivia, Costa Rica, the Czech Republic, Ecuador, Egypt, Finland, France, Guatemala, Germany, Greece, Libya, Honduras, Iran, Italy, Japan, Korea, Mexico, Netherlands, Panama, Russia, Spain, Switzerland, Taiwan, and Venezuela. See JOHN Y. GOTANDA, *SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW* 200-26 (1998).

25. See Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 324-25 (1989); Wolfgang Kühn, *RICO Claims in International Arbitration and Their Recognition in Germany*, 11 J. INT'L ARB. 37, 42 (June 1994).

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court judgment or arbitral award of punitive damages.²⁶ However, the prohibition on punitive damages in civil law countries is not universal. The codes of Norway, Poland, Brazil, Israel, and the Philippines allow for some form of exemplary relief.²⁷

By contrast, punitive damages have been an institution of the common law for more than 200 years.²⁸ As explained below, these damages are allowed in such countries as Australia, Canada, England, New Zealand, and the United States.²⁹

26. See Judgment of the Bundesgerichtshof, IXth Civil Senate, Jun. 4, 1992, Docket No. IX ZR 149/91, [1992] *Wertpapiermitteilungen* 1451, summarized in pertinent part in Peter Hay, *The Recognition of American Money Judgments in Germany--The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729, 730-49 (1992); Judgment of the Tokyo High Court of 28 June 1993, on appeal from *Northcon I v. Yoshitaka Katayama; Mansei Kogyo Kabushiki Kaisha*, Tokyo District Court Judgment, February 18, 1991, summarized in pertinent part in Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, XLIII NETHERLANDS INT'L L. REV. 143, 167-68 (1996).

A survey of lawyers throughout the world on the enforceability of foreign judgments has disclosed varying views on this issue. Some practitioners believe that Austria, the Czech Republic, Denmark, and Italy would not enforce foreign awards of punitive damages, but that Finland, France, Hungary, Poland, Portugal, Spain, and Sweden would do so. See generally ENFORCEMENT OF FOREIGN JUDGMENTS (Louis Garb & Julian Lew eds., 2002).

27. See Introductory Law to the Penal Code § 19, summarized in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 10, at 93 (1986); Civil Code of the Polish People's Republic art. 448 (Polish Academy of Sciences Institute of State and Law trans., 1981); Código Civil [C.C.] arts. 1547, 1550 (Braz.) (Joseph Wheless trans., 1920); THE LAW OF ISRAEL: GENERAL SURVEYS 474 (Itzhak Zamir & Sylviane Colobo eds., 1995); Civil Code arts. 2197, 2216, 2233-35 (Phil.), reprinted in 5 CIVIL CODE OF THE PHILIPPINES ANNOTATED 869 (Edgardo L. Paras ed., 12th ed. 1990).

28. See MCGREGOR, *supra* note 12, at §§ 309-11, at 226-27; F.H. LAWSON & HARVEY TEFF, REMEDIES OF ENGLISH LAW 133 (1980); HARRY STREET, PRINCIPLES OF THE LAW OF DAMAGES 28-29 (1962). There is no definitive historical reason as to why punitive damages were accepted in common law countries, but not in civil law jurisdictions. For a discussion of the likely reason for the difference, see GOTANDA, *supra* note 24, at 200-01 (stating that the difference can perhaps best be explained by the practice of in common law countries for juries to award damages, as opposed to civil law countries where judges decide controversies).

29. See *Lamb v. Cotogno*, 164 C.L.R. 1 (1987); *Musca v. Astle Corp. Pty. Ltd.*, 80 A.L.R. 251 (1988); *Lackersteen v. Jones*, 92 F.L.R. 6 (1988); *H. S. v. Mundy*, 9 D.L.R.3d 446 (Ont. Co. Ct. 1969); Civil Code, S.Q., ch. 64, art. 1621 (Que.) (1991); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); *Rookes v. Barnard*, [1964] All E.R. 367 (H.L.); *Cassell & Co., Ltd. v. Broome*, [1972] 1 All E.R. 801 (H.L.); *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97; *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81; *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). See also FRANCIS TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 242-43 (1985); S.M. WADDAMS, THE LAW OF DAMAGES 562 (1983); JOHN W. MORRISON, THE INSURABILITY OF PUNITIVE DAMAGES 53-64 (1985); STEPHEN M.D. TODD, THE LAW OF TORTS IN NEW ZEALAND 870-73 (1991); RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE (2003).

Punitive damages also are available in Northern Ireland and the Republic of Ireland. See

III. PUNITIVE DAMAGES IN COMMON LAW COUNTRIES

There is no uniform practice among the major common law countries with respect to punitive damages. Countries differ on the purposes that punitive damages serve, the actions in which they may be awarded, the factors considered in determining the amount of the punitive damages award, and on what constitutes an excessive award.

A. *England*

Scullion v. Chief Constable, Royal Ulster Constabulary (“RUC”), [Jun. 10, 1988] (Q.B.) (LEXIS, NI Law library, cases file); Whelan v. Madigan, [1978] I.L.R.M. 136 (H.C.); Garvey v. Ireland, [1981] I.L.R.M. 226 (H.C.); *see also* BRYAN M.E. MCMAHON & WILLIAM BINCHY, IRISH LAW OF TORTS 774 (2d ed. 1990); The Law Reform Commission, Consultation Paper on Aggravated, Exemplary and Restitutionary Damages (Apr. 1998), available at http://www.lawreform.ie/publications/data/Irc/Irc_97.html.

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The common law tradition of awarding punitive damages traces its roots to England.³⁰ However, unlike other common law countries, England restricts punitive damages to three categories of cases: (1) suits involving oppressive action by government servants; (2) suits involving conduct calculated to result in profit which may well exceed the compensation payable to the plaintiff; and (3) suits for punitive damages expressly authorized by statute. Recently, there have been efforts both to expand the availability of punitive damages, as well as to limit the size of such awards.

The first major reported case in England to award punitive damages was *Wilkes v. Wood*, which was decided in 1763.³¹ In *Wilkes*, punitive damages were awarded to a publisher after the Secretary of State to the King suspected that the publisher had printed a libelous pamphlet about the King and had the publisher's home searched and property seized without obtaining a proper warrant. Chief Justice Pratt explained that the award of punitive damages satisfies the injured person, punishes the guilty, deters such actions in the future, and shows the jury's detestation of the wrongful conduct. Within a decade of *Wilkes*, courts commonly awarded punitive damages in tort actions such as assault, false imprisonment, defamation, seduction, malicious prosecution, and trespass.³² However, these damages were never allowed in breach of contract cases.³³

In 1964, England's House of Lords severely limited the availability of punitive damages in *Rookes v. Barnard*.³⁴ There, the plaintiff claimed that a trade union had unlawfully induced his employer to dismiss him. A jury awarded the plaintiff £7,500 in punitive damages, but the Court of Appeal reversed, ruling that the union had not committed any tort. The

30. See generally F.H. LAWSON & HARVEY TEFF, REMEDIES OF ENGLISH LAW 133 (1980); 12 HALSBURY'S LAWS OF ENGLAND ¶1190 (4th ed. 1975); HARRY STREET, PRINCIPLES OF THE LAW OF DAMAGES 28-29 (1962); Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of Rationale*, 40 ALA. L. REV. 741, 745-50 (1989); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518-20 (1957).

31. See *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763).

32. See MCGREGOR, *supra* note 12, § 310, at 227; see also *Loudon v. Ryder*, [1953] 1 All E.R. 741 (C.A.) (assault); *Dumbell v. Roberts*, [1944] 1 All E.R. 326 (C.A.) (false imprisonment); *Bull v. Vazquez*, [1947] 1 All E.R. 334 (C.A.) (defamation); *Tuidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1779) (seduction); *Leith v. Pope*, 96 Eng. Rep. 777 (C.P. 1779) (malicious prosecution); *Bulli Coal Mining Co. v. Osbourne*, [1899] All E.R. 506 (trespass); *Owen & Smith v. Reo Motors*, [1934] 151 L.T.R. 274 (C.A.) (trespass to goods).

33. See MCGREGOR, *supra* note 12, § 310, at 227.

34. See *Rookes v. Barnard*, [1964] A.C. 1129 (H.L.).

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House of Lords held that the judgment on liability should be restored, but ordered a new trial on the question of damages.

Speaking for their lordships on the issue of punitive damages, Lord Devlin stated that there exists only three categories of cases in which punitive damages are appropriate: (1) suits involving oppressive, arbitrary, or unconstitutional actions by servants of the government; (2) cases in which the defendant's conduct has been calculated to make a profit that may well exceed the compensation available to the plaintiff; and (3) actions where punitive damages are authorized by statute.³⁵

To fall within the first category, a case must meet two requirements. First, there needs to be an act that is oppressive, arbitrary or unconstitutional. In *Holden v. Chief Constable of Lancashire*, the Court of Appeal noted that these terms are to be read disjunctively and, as a result, it may be possible to fall within the first category even if the unconstitutional action was neither oppressive nor arbitrary.³⁶ Second, the act must have been committed by one exercising government power. The House of Lords clarified this requirement in its celebrated decision, *Cassell & Co., Ltd. v. Broome*.³⁷ There, the House of Lords stated that the first category is to be broadly construed to include conduct by the police, municipal officers, and other officials.³⁸

With respect to the second category (conduct calculated to result in profit), Lord Devlin explained in *Rookes*:

This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object . . . which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.³⁹

The House of Lords further clarified the test for this category in *Cassell*, stating that there must exist: (1) a knowledge that the proposed action is against the law or a reckless disregard for whether the proposed action is illegal or legal; and (2) a decision to carry on doing the proposed action

35. *Id.* at 1225-28.

36. *See Holden v. Chief Constable of Lancashire*, [1987] Q.B. 380, 388.

37. *See Cassell & Co., Ltd. v. Broome*, [1972] 1 All E.R. 801 (H.L.).

38. *See id.* at 830.

39. *Rookes*, [1964] A.C. at 1227.

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because the prospects of material advantage outweigh the prospects of material loss.⁴⁰ Accordingly, this category includes cases such as libel, trespass, and other malicious and illegal acts.⁴¹

The third category includes claims for punitive damages that are authorized by statute. Because few statutes include this authorization, these claims are rare. An example of a statute that authorizes punitive damages is the Reserve Auxiliary Forces Act 1951.⁴² It provides “[i]n any action for damages for conversion or other proceedings which lie by virtue of any such omission, failure or contravention, the court may take account of the conduct of the defendant with a view, if the court thinks fit, to awarding exemplary damages in respect of the wrong sustained by the plaintiff.”⁴³

In 1993, in *AB v. South West Water Services Ltd.*, the Court of Appeal greatly limited the types of cases in which punitive damages may be recovered by holding that a cause of action in public nuisance could not support a claim for punitive damages.⁴⁴ It ruled that, in order to fall within the first two categories set forth in *Rookes v. Barnard*, the tort must be one in which an award of punitive damages was made prior to 1964, the date of *Rookes*. Because punitive damages had not been awarded in public

40. See *Cassell*, 1 All E.R. at 831.

41. See *Branchette v. Beaney*, [1992] 3 All E.R. 910 (C.A.); *Drane v. Evargelou*, [1978] 2 All E.R. 437 (C.A.). Many of the cases in the second category have dealt with landlord tenant issues, such as early eviction for a more profitable tenant. Punitive damages in this area are relatively small. By contrast, claims for punitive damages in defamation actions have produced larger punitive damage awards by English standards. See Law Commission Report, *supra* note 7, at ¶¶ 4.13-4.15.

42. See Reserve and Auxiliary Forces (Protection of Civil Interests) Act, 1951, 14 Geo. 6, 13(2) (Eng.).

43. *Id.* See *Cala Homes (South) Ltd. v. McAlpine Homes East Ltd (No.2)*, [1996] F.S.R. 36, 40 (Ch.) (ruling that the Copyright, Designs and Patents Act, 1988, which gives courts discretionary power to award additional damages for copyright infringement, infringement of design right, and infringement of performer’s property, authorizes awards of punitive damages). *But see* *Redrow Homes Ltd. v. Bett Brothers plc.*, [1996] F.S.R. 828, 837 (Court of Session) (stating that additional damages under the Copyright, Designs and Patents Act, 1988, included aggravated, but not punitive damages). See also Christina Michalos, *Copyright and Punishment: The Nature of Additional Damages*, 22(10) EUR. INTELL. PROP. REV. 470 (2002).

44. See *AB v. South West Water Serv. Ltd.*, [1993] Q.B. 507, 523 (C.A.). In *AB*, the plaintiff fell ill after drinking contaminated water from defendant. The water had been accidentally polluted with aluminum sulphate. The plaintiff claimed damages, including aggravated and punitive damages, for breach of common law and statutory duties, strict liability, breach of contract, negligence and nuisance. The defendant admitted liability for compensatory damages, but sought to strike the claims for punitive and aggravated damages. The trial judge refused to do so and the defendant appealed. *Id.* at 515.

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nuisance cases prior to 1964, there could now be no claim for such damages.⁴⁵

The decision in *AB* limited the first category to the torts of malicious prosecution, false imprisonment, assault, and battery. In addition, it limited the second category primarily to cases of defamation, trespass to land, and tortious interference with business. Thus, punitive damages became unavailable in suits based on negligence, public nuisance, deceit, and patent infringement, as well as unlawful discrimination based on sex, race, or disability.⁴⁶

In 2001, the House of Lords rejected this limitation in *Kuddus v. Chief Constable of Leicestershire Constabulary*.⁴⁷ In that case, the plaintiff brought suit against a police constable for misfeasance of office and sought, among other things, punitive damages.⁴⁸ The trial judge struck the claim for punitive damages on the ground that misfeasance of office was not a cause of action for which punitive damages were awarded prior to 1964. The Court of Appeal affirmed and the plaintiff appealed to the House of Lords.

The House of Lords held that the availability of punitive damages should not be limited solely to those cases in which the relevant cause of action had recognized the award of such damages prior to 1964. The House of Lords viewed this requirement as irrational. As Lord Slynn explained, under the old rule, whether a claim for punitive damages could be brought depended “not on principle but upon the accidents of litigation (or even of law reporting) before 1964, at a time, moreover, when the distinction between exemplary and aggravated damages was by no means so clearly drawn as it is now.”⁴⁹ He added that “such a rigid rule seems to me to limit the future development of the law even within the restrictive categories adopted by Lord Devlin [in *Rookes*] in a way which is contrary to the normal practice of the courts”⁵⁰ The House of Lords concluded

45. *See id.* at 523.

46. *See* Law Commission Report, *supra* note 7, at ¶ 4.24.

47. [2002] 2 A.C. 122, 134-135.

48. *Id.* at 128-29. The plaintiff had filed a police report claiming that property was missing from his flat. The police constable stated that the matter would be investigated, but the constable subsequently falsified the plaintiff’s signature on a written statement withdrawing the complaint and the investigation was closed. The plaintiff then filed suit. *Id.*

49. *See id.* at 136-137 (quoting PERCY HENRY WINFIELD ET AL., WINFIELD & JOLOWICZ ON TORTS (15th ed. 1998)).

50. *Kuddus*, 2 A.C. at 134.

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that, to determine whether a case allows for punitive damages, the focus should be not on the cause of action, but on whether the circumstances in which the tort is committed bring it within one of the three categories allowing for these damages.⁵¹

The decision in *Kuddus* significantly broadens the types of actions in which punitive damages may be awarded. In general, plaintiffs may claim punitive damages in any tort action where the facts show the case to fall within any of the three categories. These torts include negligence suits and cases involving unlawful discrimination based on sex, race, or disability. However, in breach of contract cases, punitive damages are still prohibited.⁵²

Six limitations restrict the availability of punitive damages in England. The first is the “if, but only if,” test. A court can award punitive damages only if compensatory damages are inadequate to punish the defendant, deter others, and mark the court’s disapproval of such conduct.⁵³ Second, the plaintiff must be the victim of the defendant’s punishable behavior.⁵⁴ Third, punitive damages may not be appropriate if the defendant has already been punished for the wrongful conduct. The principle is based on the rationale that one should not be punished twice for the same conduct.⁵⁵ Fourth, the existence of multiple plaintiffs may limit the availability of punitive damages. The reasons for this limitation are that a court may be unable to apportion an award when not all of the plaintiffs are known or are before the court, or when not all of the plaintiffs may have been subjected to the alleged oppressive, arbitrary or unconstitutional behavior.⁵⁶ Fifth, punitive damages may not be justified when the defendant has acted in good faith.⁵⁷ Sixth, if the plaintiff caused or contributed to the behavior complained of, that may preclude an award punitive damages.⁵⁸

With respect to the quantum of punitive damages, “[e]verything

51. *See id.* at 135.

52. *See Addis v. Gramophone Co. Ltd.*, [1909] A.C. 488; Law Commission Report, *supra* note 7, at ¶¶ 5.71-5.73

53. *See Cassell*, [1972] A.C. at 1126.

54. *See Rookes*, [1964] A.C. at 1227.

55. *See, e.g., Archer v. Brown*, [1985] 1 Q.B. 401, 423 (Q.B.).

56. *See AB*, [1993] Q.B. at 527-528, 531.

57. *See Holden v. Chief Constable of Lancashire*, [1987] Q.B. 380, 388 (C.A.).

58. *See Thompson v. Commissioner of Police of the Metropolis*, [1998] Q.B. 498, 517.

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which aggravates or mitigates the defendant's conduct is relevant."⁵⁹ Courts have thus considered a variety of factors in determining the amount of punitive damages, including *inter alia* the wealth of the defendant, the windfall to the plaintiff that would result from an award of punitive damages, whether there exists multiple plaintiffs or multiple defendants, whether the plaintiff caused the defendant's conduct, whether the defendant acted in good faith, and the need for restraint in assessing punitive damages.⁶⁰

When punitive damages are assessed by a jury, the traditional practice had been to provide only general guidance concerning the appropriate level of damages.⁶¹ In 1997, however, in response to excessive jury damages awards, the Court of Appeal in *Thompson v. Commissioner of Police of the Metropolis* directed trial judges to play a greater role in helping the jury determine the amount of punitive damages in actions against police for unlawful conduct.⁶² When punitive damages are at issue, the Court of Appeal stated that the trial judge should explain to the jury that: (1) the plaintiff has already been compensated for his or her injuries and that any award of compensatory and aggravated damages includes, from the defendant's viewpoint, a measure of punishment; (2) the jury should award punitive damages only if, in their view, the basic and aggravated damages are inadequate to punish the defendant for oppressive, arbitrary, or unconstitutional behavior; (3) a punitive damages award provides a windfall to the plaintiff and that an award of such damages may mean that that amount may not be available to be spent by the police for the benefit of the public; and (4) the amount of punitive damages should be no greater than the minimal amount needed to mark the jury's disapproval of the defendant's behavior.⁶³

The Court of Appeal also set forth damage "brackets" to guide juries in determining the amount of compensation and punitive damages.⁶⁴

59. *Rookes*, [1964] A.C. 1228.

60. See *Cassell*, [1972] A.C. at 1063; *Thompson v. Commissioner of Police of the Metropolis*, [1998] Q.B. 498, 517 (C.A.); *Riches v. News Group Newspapers Ltd.*, [1986] Q.B. 256, 276 (C.A.); *Holden v. Chief Constable of Lancashire*, [1987] Q.B. 380, 388 (C.A.).

61. See *Cassell*, [1972] A.C. at 1065-66; *John v. MGN Ltd.*, [1997] Q.B. 586, 608 (C.A.).

62. See *Thompson*, [1998] Q.B. at 498.

63. See *id.* at 507.

64. In *Rookes*, Lord Devlin noted that because exemplary relief is in effect, a punishment invoked without the safeguards of the criminal law system, it may be necessary to place arbitrary

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With respect to punitive damages, the court stated that awards of punitive damages in these types of cases are unlikely to be less than £5,000.⁶⁵ In fact, the court noted that an award of punitive damages is probably not justified if the amount would be less than that. It added that the defendant's conduct must be particularly deserving of condemnation for an award of as much as £25,000 and that £50,000 should be regarded as the absolute maximum.⁶⁶ Furthermore, the Court of Appeal opined that it would be unusual for the punitive damages to be more than three times the basic damages, except where the basic damages are modest.⁶⁷

In England, excessive awards of punitive damages are prohibited. Because, as noted above, English courts traditionally show great deference to the decision of a jury, they rarely set aside an award of punitive damages as excessive. As Lord Hailsham explained in *Cassell & Co. Ltd. v. Broome*, an award of punitive damages may not be set aside unless it is "so large . . . that twelve sensible men could not have reasonably given them" or that "no reasonable proportion existed between it and the circumstances of the case."⁶⁸ However, in 1990, the Court and Legal

limits on awards of punitive damages. *Rookes*, [1964] A.C. at 1228.

65. £5,000 is approximately equal to US\$8,034, based on a conversion rate of £1=US\$1.60675. See <http://www.xe.com/ucc/convert.cgi>.

66. *Thompson*, [1998] Q.B. at 517. It further stated:

The figures given will of course require adjusting in the future for inflation. We appreciate that the guideline figures depart from the figures frequently awarded by juries at the present time. However they are designed to establish some relationship between the figures awarded in this area and those awarded for personal injuries. . . . [W]e have taken into account the fact that the action is normally brought against the chief officer of police and the damages are paid out of police funds for what is usually a vicarious liability of the acts of his officers in relation to which he is a joint tortfeasor. In these circumstances it appears to us wholly inappropriate to take into account the means of the individual officers except where the action is brought against the individual tortfeasor.

Id. £50,000 is approximately equal to US\$80,338, based on a conversion rate of £1=US\$1.60675. See <http://www.xe.com/ucc/convert.cgi>.

67. See *id.* at 518.

68. See *Cassell*, [1972] 1 All ER at 819 (quoting *Praed v. Graham*, (1889) 24 Q.B.D. 53, 55; *M'Grath v. Bourne*, (1876) L.R. 10 CL 160, 164). Lord Hailsham explained the rationale for the rule as follows:

The point is that the law makes the jury and not the judiciary the constitutional tribunal [for deciding the award of damages]. It may very well be that, on the whole, judges and the legal profession in general, would be less generous than juries in the award of damages . . . [b]ut I know of no principle reason which would entitle judges, whether of appeal or at first instance, to consider their

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Services Act of 1990 granted the Court of Appeal the power to vacate the jury's award and substitute its own award when the court finds that the jury's award is excessive.⁶⁹ In light of this change and in response to a number of cases involving disproportionately large awards, the Court of Appeal appears to be scrutinizing these awards more closely and has significantly reduced awards of punitive damages in a number of cases.⁷⁰

In *John v. MGN*, well-known entertainer Sir Elton John sued the MGN Ltd., a national newspaper publisher, after it ran an article claiming that John was on a bizarre diet that had the potential to kill him.⁷¹ The jury awarded John £75,000 in compensatory damages and £275,000 in punitive damages. MGN appealed. The Court of Appeal reduced the compensatory damages award to £25,000 because, although the article was false and offensive and the newspaper was reckless in failing to verify the accuracy of the story, it had not damaged John's reputation as an artist. The court also determined that the £275,000 punitive damages award was "manifestly excessive" under the circumstances. It concluded that £50,000 would be sufficient to "ensure that justice is done to both sides" and to "fully secure the public interest involved."⁷²

In *Thompson*, the Court of Appeal heard two consolidated cases where punitive damages were claimed to be excessive. Applying the guidelines and damage brackets discussed previously, it reduced one award of punitive damages.⁷³ In the first case, the plaintiff sued the police for false imprisonment and malicious prosecution, and the jury awarded £1,500 in compensatory damages and £50,000 in punitive damages. In the

own sense of the properties as more reasonable than that of a jury, or which would entitle them to arrogate to themselves a constitutional status in this matter which Parliament has deliberately withheld from them, for aught we know, on the very ground that juries can be more generous on such matters than judges.

Cassell, 1 All E.R. at 819.

69. See The Courts and Legal Services Act, 1990, 8(2) (Eng.).

70. See, e.g., *John v. MGN Ltd.*, [1997] Q.B. 586; (C.A.); *Thompson*, [1998] Q.B. 498, 507 (C.A.). See also *Riches v. News Group Newspapers Ltd.*, [1986] Q.B. 256. In *Riches*, a jury in a defamation suit awarded the plaintiff £300 in compensatory damages and £250,000 in punitive damages. The Court of Appeal determined that the punitive damages award that was 85 times the compensatory damages was excessive and that no reasonable jury which was properly directed could have arrived at that figure. The concluded that an award of £25,000 would suffice. *Id.* at 278.

71. *John v. MGN Ltd.*, [1997] Q.B. at 586.

72. *Id.* at 626.

73. *Thompson*, [1998] Q.B. 498.

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second case, the plaintiff sued the police for wrongful arrest, false imprisonment and assault, and the jury awarded £20,000 in compensatory damages (including aggravated damages) and £200,000 in punitive damages. The Court of Appeal left undisturbed the award in the first case, because, while it would have increased the compensatory damages award to £20,000 and reduced the punitive damages award to £25,000, the original award of £51,500 was not significantly higher than the £45,000 total of what the court would have awarded.⁷⁴ By contrast, in the second case, the court determined that the £200,000 in punitive damages was excessive. It agreed that the circumstances justified an award of punitive damages, noting that there was unprovoked violence involving a number of officers in connection with the arrest at the plaintiff's home. However, it stated that because the whole incident was over in matter of hours and the plaintiff had received an award of aggravated damages, the court reduced the punitive damages to £15,000. That amount, the court said "should suffice to demonstrate publicly the strongest disapproval of what occurred and make it clear to the commissioner and his force that conduct of this nature will not be tolerated by courts."⁷⁵ Following the guidelines laid down in *Thompson*, the Court of Appeal in *Goswell v. Commissioner of Police for Metropolis*, reduced a jury award of £120,000 for assault, £12,000 for false imprisonment, and £170,000 for punitive damages.⁷⁶ There, the plaintiff was assaulted while police unlawfully detained him for twenty minutes. The Court of Appeal reduced the damages for assault and false imprisonment to £22,500 and £100, respectively and 10,000 for aggravated damages.⁷⁷ With respect to the punitive damages award, the court stated that the award of punitive damages should be set with the aim of marking its disapproval of the defendant's conduct and with the knowledge that such an award would

74. *See id.* at 519.

75. *See id.* at 529-30.

76. *Goswell v. Commissioner of Police for Metropolis*, [1998] EWCA Civ. 653 (unreported transcript on file with author).

77. *See id.* The court assessed 22,500 for assault by looking at the physical scarring and psychological impact on the defendant. For physical scarring, the court relied on the Guidelines for the Assessment of General Damages in Personal Injury Cases, 3rd Edition, which gives ranges for both physical scarring and psychological damages. The court assessed 100 for false imprisonment based on *Thompson*, which stated that for false imprisonment, damages should be approximately 500 for every hour. The court stated that 100 would meet the damage requirement for twenty minutes of false imprisonment.

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constitute a windfall to the plaintiff and deplete police funds to the possible detriment of the general public. Noting that the damages brackets set forth in *Thompson* provided that awards in these types of cases should be no less than £5,000 and no more than £50,000, and that an award of £25,000 requires conduct particularly deserving of condemnation, the court reduced the punitive damages award from £170,000 to £15,000. The court explained that the conduct warranting punitive damages was a single blow by a single police officer whom the defendant commissioner sought to discipline and that such an award would be “appropriate . . . in the overall spectrum of cases of police misbehavior.”⁷⁸

In the most recent decision of note, *Watson v. Chief Constable of Cleveland Police*,⁷⁹ a jury assessed £500 for assault, £3,500 for malicious prosecution, £1,500 aggravated damages, and £16,000 punitive damages. On appeal, the Court of Appeal initially pointed out that while the compensatory damages awards (including aggravated damages) were within the brackets set forth in *Thompson*, the award of punitive damages exceeded the appropriate bracket by £1,000. It also noted that in *Thompson*, the court stated that, except in unusual cases, punitive damages awards, when combined with the other damages, should not result in the total award (basic, aggravated and punitive damages) exceeding three times the basic damages. Applying this test, the court determined that the award of punitive damages should not have exceeded £6,500.⁸⁰ Although the court concluded that the facts of the case justified an award exceeding the *Thompson* bracket, it found that the £16,000 punitive damages award was simply too great, especially since it greatly exceeded the £6,500 upper limit set by *Thompson*. The court held that an award of £9,000 in punitive damages would be appropriate.⁸¹

In sum, England appears to be expanding the number of actions in which punitive damages may be awarded while trying to limit the amount of punitive awards that are imposed. In an attempt to make punitive

78. *Id.*

79. [2001] EWCA Civ 1547 (C.A.).

80. Three times the basic damages (£4,000) is £12,000. However, the punitive damages award of £16,000 greatly exceeded this amount. The court calculated that if, under *Thompson*, the total award should not have exceeded £12,000 and the sum of the basic and aggravated damages was £5,500, then punitive damages should not have exceeded £6,500. *Id.* at ¶ 39.

81. *See id.* at ¶ 41. The Court explained “[t]hat [the £9,000 punitive damages award] is a difference in the overall figure of £7,000. That is a substantial difference in the whole amount of nearly one-third of the damages.” *Id.*

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awards less indeterminate, the courts are giving more direction to the juries and judges who assess the penalties.

B. *Australia*

In Australia, punitive damages may be sought in a wide variety of tort actions. However, they are considered an extraordinary remedy, appropriate only in cases of truly outrageous conduct. Recently, a report by the Law Council of Australia noted that punitive damages “are hard to get, although it is a sad fact that more examples are emerging.”⁸²

As in England, the purpose of punitive damages in Australia is to punish and deter.⁸³ But unlike England, Australia has declined to restrict punitive damages to certain categories as England’s House of Lords did in *Rookes v. Barnard*. In *Uren v. John Fairfax & Sons Pty Ltd.*, High Court of Australia Justice Windeyer explained that “the propositions which [Lord Devlin] laid down [in *Rookes*] are not in accord with the common law as it has always been understood in this country and I can see no good reason why we should now place such narrow limits upon the right of a jury to award punitive damages in appropriate cases”⁸⁴ Instead, punitive damages are available in any tort action where the defendant has engaged in a “conscious wrongdoing in contumelious disregard of another’s rights.”⁸⁵ Thus, in Australia, punitive damages may be awarded for trespass to chattel, trespass to land, trespass to the person, deceit, and defamation.⁸⁶ Punitive damages also may be awarded in negligence cases,

82. Second Submission by the Law Council of Australia to the Negligence Review Panel on the Review of the Law of Negligence ¶ 11.237 (Sept. 2, 2002).

83. See FRANCIS TRINDALE & PETER CANE, *THE LAW OF TORTS IN AUSTRALIA* 243 (1985).

84. *Uren v. John Fairfax & Sons Pty Ltd.* (1966) 117 C.L.R. 118, 160 (Windeyer, J.). The Privy Council agreed with the High Court’s decision. See *Australian Consolidated Press Ltd. v. Uren* (1967) 117 C.L.R. 221. Commentators believe that the rejection of *Rookes* was noteworthy because, at that time, courts in Australia typically followed the rulings of the House of Lords. See Michael Tilbury & Harold Luntz, *Punitive Damages in Australian Law*, 17 *LOY. L.A. INT’L COMP. L.J.* 769, 774 (1995).

85. See *Whitfeld v. DeLauret & Co. Ltd.* (1920) 29 C.L.R. 71, 77 (Knox, C.J.); see also *Tan v. Benkovic* (2000) N.S.W.C.A. 295, at ¶ 46.

86. See *Sales Pty. Ltd. v. Inglis Electrix Pty. Ltd.* (1968) 1221 CLR 584; *XL Petroleum (NSW) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd.* (1985) 155 CLR 448; *Lamb v. Cotogno* (1987) 164 CLR 1; *Musca v. Astle Corporation Pty. Ltd.* (1988) 80 ALR 251; *Uren v. John Fairfax & Sons Pty. Ltd.* (1966) 117 CLR 118. See also Duncan Miller, *Restitutionary and Exemplary Damages for Copyright Infringement*, 14 *AUSTL. B. REV.* 143 (May 24, 1996).

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but only when the defendant acted with conscious wrongdoing or reckless indifference in contumelious disregard of the plaintiff's rights.⁸⁷ However, they are not awarded in breach of contract cases.⁸⁸

There are two significant limitations on the availability of punitive damages. First, while Australia has rejected the *Rookes* categorical approach to the availability of punitive damages, it has adopted Lord Devlin's "if, but only if" principle. Accordingly, punitive damages may be awarded only if compensatory damages are inadequate to punish the defendant, deter the defendant from repeating it, and mark the court's disapproval of such conduct.⁸⁹

Second, punitive damages may not be assessed against the defendant if he or she has already been substantially punished in a criminal proceeding. *Gray v. Motor Accident Commission* illustrates this principle.⁹⁰ In that case, the defendant deliberately struck the plaintiff with his car, seriously injuring him. The defendant was then convicted of intentionally causing grievous bodily harm, and sentenced to seven years in prison. A civil suit ensued in which the plaintiff sought *inter alia* punitive damages. The High Court ruled that the seven-year prison sentence constituted substantial punishment for the same conduct that was the subject of the civil proceeding and, as a result, operated as a bar to the assessment of punitive damages. The court reasoned that here the purposes of exemplary damages – punishment and deterrence – had been fulfilled by the criminal proceedings. In addition, imposing punitive damages after a criminal proceeding involving the same conduct would punish the defendant twice.⁹¹

It also is important to note that some states have placed limitations on the awarding of exemplary damages. For example, New South Wales does not allow exemplary damages for motor accident injuries and industrial injuries.⁹² Unlike many other common law countries, New

87. See *Gray v. Motor Accident Comm'n* (1998) 158 A.L.R. 485, 491; *Midalco Pty. Ltd. v. Rabenalt* (1989) VR 461; see also *Lamb v. Cotogno* (1987) 164 C.L.R. 1, 13.

88. See *Hospitality Group Pty. Ltd. v. Australian Rugby Union Ltd.* (2001) 110 F.C.R. 157; *Whitfield v. De Lauret & Co. Ltd.* (1920) 29 C.L.R. 71; see also Darryn Jensen, *Punitive Damages for Breach of Fiduciary Obligation*, 19 U. QUEENSLAND L.J. 125 (1996-97).

89. See *Backwell v. AAA* (1997) 1 V.R. 182, 1996 VIC LEXIS 730, at *91.

90. See *Gray v. Motor Accident Commission* (1998) 196 C.L.R. 1, 14.

91. See *id.* at 14.

92. See Motor Accidents Compensation Act, § 144 (NSW) ("A court cannot award exemplary or punitive damages to a person in respect of a motor accident."); Workers'

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South Wales also prohibits punitive damages in defamation actions.⁹³ In addition, Victoria bars punitive damages in wrongful death actions.⁹⁴

In determining the amount of damages, any relevant fact may be considered.⁹⁵ However, the principal focus is on the wrongdoer, and not on the wronged party or the tort.⁹⁶ The seven most relevant factors include the nature of the defendant's conduct and the extent of the injury caused by the defendant (insofar as it shows the heinousness of the defendant's actions).⁹⁷ In addition, the deterrent effect on the defendant and others may be taken into account, as well as the extent to which the defendant derived any profit from the wrong doing.⁹⁸ Another consideration is whether the plaintiff provoked the defendant.⁹⁹ Furthermore, the defendant's capacity to pay punitive damages may be considered and can reduce or eliminate an award of such damages if it will cause an undue hardship.¹⁰⁰ The extent to which punitive damages will provide a windfall to the plaintiff may also be taken into account in setting the size of the award.¹⁰¹ However, in Australia, the award of punitive damages

Compensation Act 1987, § 151R (NSW) ("A court may not award exemplary or punitive damages to a person in an award of damages.").

93. See Defamation Act, 1974, § 46(3) (NSW) ("In particular, damages for defamation: shall not include exemplary damages."). See also The Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, No. 11, 1979, ¶ 263 (recommending eliminating punitive damages in defamation actions).

94. See *Reindel v. James Hardie & Co. Pty. Ltd.* (1994) 1 V.R. 619.

95. See Jane Swanton and Barbara McDonald, *Commentary on the Report of the English Law Commission on Aggravated, Restitutionary And Exemplary Damages*, 1999 T.L.J. LEXIS 22, 25 (1999).

96. See *Gray*, 196 C.L.R. at 7.

97. Typically, the more outrageous the defendant's conduct, the larger the award of punitive damages. See, e.g., *Adams v. Kennedy* (2000) 29 N.S.W.L.R. 78; *Lee v. Kennedy* (2000) N.S.W.C.A 153.

98. See *Gray*, 196 C.L.R. at 50.

99. See *Fontin v. Katapodis* (1962) 108 C.L.R. 177, 178 (stating "provocation is a ground for mitigating punitive damages, but not compensatory damages"); *Lamb*, (1987) 1 C.L.R. at 13 (stating "with exemplary damages, unlike compensatory damages, provocation may operate to prevent an award or to reduce the amount which might otherwise be awarded").

100. See *Backwell*, 1 V.R. at 87; *XL Petroleum*, 155 C.L.R. at 472; see also Jane Swanson & Barbara McDonald, *Commentary on the Report of the English Law Commission on Aggravated, Restitutionary and Exemplary Damages*, 7 TORTS L.J. 184, TLJ LEXIS 22, at *26-27 (1999).

101. See *Gray*, 196 C.L.R. at 7 (stating "if exemplary damages are awarded, they will be paid in addition to compensatory damages, and, in that sense, will be a windfall in the hands of the party who was wronged").

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need not be proportional to the amount of compensatory damages.¹⁰²

Australian courts have expressed concern about the size of punitive damages awards and, as a result, they have insisted that juries be appropriately instructed on the need for restraint and moderation.¹⁰³ In *Backwell v. AAA*, the trial judge instructed the jury that damages must be “reasonable and just” and that the jury must be “careful to see that the punishment is neither too great nor too little for the conduct which is deserving of punishment.”¹⁰⁴ The Victoria Court of Appeal ruled that this instruction did not sufficiently emphasize the risks of an excessive award of punitive damages. The Court of Appeal stated that the trial judge should have specifically instructed the jury that it should display restraint and moderation in awarding punitive damages. The court explained:

It should be remembered that this parasitic form of damages involves the infliction of punishment which has no necessary reference to the loss suffered by the plaintiff and so in imposing a punishment by way of exemplary damages juries are asked to take on a role which they ordinarily do not have in relation to punishment, namely fixing an appropriate penalty. The warning is perhaps even more important in an era when reports, either factual or fictional, of excessive awards of exemplary damages in the United States are reported in papers and on the television.¹⁰⁵

Predictions that large awards of large punitive damages in other countries would cause an increase in large punitive damages awards in Australia have not come to fruition, although the number of claims for such damages may have increased in recent years.¹⁰⁶ Commentators note

102. See *XL Petroleum*, 155 C.L.R. at 471 (citing *Merest v. Harvey* (1814) Taunt 442, where minimal compensatory damages were awarded but substantial amount of punitive damages were assessed against defendant); see also *Sanders v. Snell* (1997) 73 F.C.R. 598.

103. See *Backwell*, 1996 VIC LEXIS at *75; *Carson v. John Fairfax and Sons Ltd.* (1993) 178 C.L.R. 44, 59; *XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil Australia* (1985) 155 C.L.R. 448, 463; see also Denise Weybury, *Case Notes: The Appeal in the Case of the Mixed-up Sperm*, 4 TORTS L.J. 214, TLJ LEXIS 8, *11 (1995).

104. *Backwell*, 1996 VIC LEXIS at *74.

105. *Id.* at *75.

106. Compare B.W. Collis, “Tort and Punishment” – *Exemplary Damages the Australian Experience*, 70 AUSTL. L.J. 47 (1996) (predicting increase in punitive damages) with Law Council Submission, *supra* note 82, at ¶ 11.237 (stating that “fear of exemplary damages fueled by stories of massive United States verdicts has long been exaggerated” and that, while

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that in personal injury cases, awards of punitive damages have been modest, often below AUS\$10,000.¹⁰⁷ And while there have been a number of awards for over AUS\$100,000, there have been no reported multi-million dollar awards.¹⁰⁸

Like England, Australia prohibits excessive awards of punitive damages. In general, an award of punitive damage is excessive if no reasonable jury could have arrived at the number or the award is out of all proportion to the circumstances of the case.¹⁰⁹ This assessment is made on a case by case basis.¹¹⁰

In *XL Petroleum (NSW) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd.*,¹¹¹ the plaintiff acquired the rights to use a parcel of land upon which it intended to sell discounted gasoline. The defendant had previously used the parcel as a service station and had installed underground fuel tanks. On the morning that the plaintiff was to take possession of the property, the defendant had the tanks punctured, which rendered them unusable for approximately a month. The plaintiff brought suit and a jury awarded the plaintiff AUS\$5,527.90 in compensatory damages and AUS\$400,000 in punitive damages.¹¹² On appeal, the Court of Appeal reduced the punitive amount to AUS\$150,000. The High Court of Australia affirmed. It ruled

“there are more examples” of punitive damages awards, “they are almost always modest”).

107. See Tilbury & Luntz, *supra* note 84, at 791. AUS\$10,000 is approximately equal to US\$6,610, based on a conversion rate of AUS\$1=US\$0.660953. See <http://www.xe.com/ucc/convert.cgi>.

108. See Law Council Submission, *supra* note 82, at ¶ 11.237. AUS\$100,000 is approximately equal to US\$66,095, based on a conversion rate of AUS\$1=US\$0.660953. See <http://www.xe.com/ucc/convert.cgi>.

109. See *Coyne v. Citizen Finance Ltd.* (1991) 172 C.L.R. 211, 238.

110. See *id.*; *Carson v. John Fairfax & Sons Ltd.* (1993) 178 C.L.R. 44, 61-62. Traditionally, juries awarded punitive damages and courts often deferred to their awards. See *Uren*, (1966) 117 C.L.R. at 128; *Carson*, 178 C.L.R. at 61. Today, appellate courts have greater power to re-assess a jury award of punitive damages. See, e.g., Supreme Court Act, 1986, 14(1) (“The Court of Appeal, in hearing and determining an appeal in a proceeding in which there has been a trial by jury, may, despite any enactment or rule of law or practice to the contrary, give any judgment on the appeal that it might have given if the proceeding had been tried without a jury and the findings or verdict of the jury had been the findings of the Judge.”). In addition, today judges more frequently assess punitive damages. See *Sanders v. Snell* (1997) 73 F.C.R. 569; *Trend Management Ltd. v. Borg* (1996) 40 N.S.W.L.R. 500; *Private Parking Services (Victoria) Pty. Ltd. & Ors. v. Huggard* (1996) Austl.Tort Rep. 81-397; *Gorski v. Miller* (1993) 174 L.S.J.S. 251; *Gazzard & Ors. v. Hutchesson & Anor.* (1995) Austl.Tort Rep. 81-337; *Pargiter v. Alexander* (1995) 5 Tas. Rep. 158.

111. 155 C.L.R. at 448.

112. See *id.* at 453

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that the AUS\$400,000 punitive damages award was out of all proportion to the circumstances of the case. Among the factors that the High Court found significant were that the tanks were repaired in three weeks, that the repair costs had been small, and that there had been no other acts by the defendant. These factors, the court believed, reduced the “seriousness of the incursion.”¹¹³ The court concluded that a reduced award of AUS\$150,000 was not excessive, although it was at the upper end of the permissible range.¹¹⁴

The case of *Backwell v. AAA* provides an additional example of where an award of punitive damages in a high profile case was reduced.¹¹⁵ There, the plaintiff claimed that she had been impregnated with the wrong donor sperm at the defendant’s clinic and that the defendant subsequently told her that she must terminate the pregnancy and, that if she did not do so, she could not receive further medical treatment at the defendant’s clinic, her identity might be revealed, which would result in adverse publicity, and that it was unlikely that any other artificial insemination program in Australia would accept her as a patient.¹¹⁶ She filed suit alleging both breach of contract and negligence claims. A jury awarded her AUS\$65,000 in compensatory damages and interest, and AUS\$125,000 in punitive damages.¹¹⁷ The Victorian Court of Appeal reduced the punitive damages award. The court determined that the trial judge had not followed the proper procedure in instructing the jury on the assessment of punitive damages and, in any event, the award was excessive. With respect to the latter, the Judge Ormiston explained that, “even making due allowance for any errors induced by the charge” and even accepting all of the plaintiff’s version of the events and rejecting those of the defendant, the jury “could not conceivably have brought an award against the [defendant] of the size that it did.”¹¹⁸ A divided court then set the punitive damages at AUS\$60,000. The court did not provide a

113. *Id.*

114. *See id.* at 463.

115. *Backwell v. AAA* (1997) 1 V.R. 182, 1996 VIC LEXIS 730, at *91.

116. *See id.* at *13, 37-38. The plaintiff underwent the abortion and, after resuming the artificial insemination program at the clinic had two children. She claimed that the defendant’s actions resulted in depression, for which she received psychiatric treatment and antidepressant medication. *See id.* at *31, 51.

117. *See id.* at *52.

118. *Id.* at *104. Similarly, Judge Tadgell called the jury award of punitive damages “perversely high.” *Id.* at *29.

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detailed explanation as to why the punitive damages should be set at that amount, noting only that “[i]n the end it is a matter of impression what value in monetary terms should be placed on the contumelious disregard of the [plaintiff’s] interests”¹¹⁹

In *Sanders v. Snell*, the High Court took the unusual step of increasing a punitive damages award because it believed that the trial judge’s award did not effectively punish and deter the defendant.¹²⁰ In that case, the plaintiff, a former Minister for Immigration and Tourism in the Sixth Legislative Assembly of Norfolk Island, sued the defendant for inducing the bureau to breach its contract with the plaintiff and for misfeasance in public office. The trial judge awarded plaintiff AUS\$17,000 (of which AUS\$500 represented the salary the plaintiff would have earned), AUS\$15,000 for loss of reputation, and AUS\$1,500 in punitive damages.¹²¹ The trial judge ruled that punitive damages were warranted, even though the defendant’s conduct was not malicious, because the defendant exhibited “contumelious behavior which entirely disregarded the rights of the members of the Bureaus and of the plaintiff.”¹²² The High Court viewed the defendant’s conduct as being more heinous, noting that the defendant took steps “calculated to destroy the personal and business reputation of a prominent member of a close-knit community and did so deliberately, knowing the likely effect of his actions.”¹²³ The High Court concluded that, in view of the circumstances, the AUS\$1,500 punitive damages award was neither appropriate punishment nor sufficient to deter others from engaging in similar acts. As a result, the High Court increased the punitive damages to AUS\$10,000.¹²⁴

There is one other recent case of particular note, *Chen v. Karandois*, where the New South Wales Court of Appeal upheld a AUS\$300,000 punitive damages award.¹²⁵ In that case, the plaintiff claimed *inter alia* that the defendants conspired to deprive him of his

119. *Id.* at *109. Judge Tadgell disagreed with the result, arguing that a new trial should be had on the issue of damages. *Id.* at *29.

120. *See Sanders v. Snell* (1997) 73 F.C.R. 598.

121. *See id.* at 573.

122. *See id.* at 599.

123. *See id.* at 602.

124. *See id.*

125. *See Chen v. Karandonis* [2002] N.S.W.C.A. 412, 2002 WL 31831586.

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interest in a joint venture and monies that he was to have received for work performed in Australia and China. In addition to compensatory damages, the trial judge awarded AUS\$300,000 in punitive damages. The defendants appealed, claiming that punitive damages were not warranted and the amount was excessive.¹²⁶ The Court of Appeal disagreed. It ruled that the defendants' actions amounted to a deliberate and significant betrayal of trust that was designed to eliminate the plaintiff's interest. In addition, it agreed with the trial judge that punitive damages were warranted, because the defendants continued to exhibit a contumelious disregard for the plaintiff's rights throughout the litigation. In particular, the defendants attempted to induce a witness to give false testimony and they tried to use the bankruptcy system to prevent the plaintiff from pursuing his claims. In view of the defendants' outrageous behavior, the court concluded that the AUS\$300,000 in punitive damages was an appropriate award.¹²⁷ Finally, the court also rejected the defendants' claim that the punitive damages award was excessive because it greatly exceeded the compensatory damages (which they argued amounted to no more than AUS\$70,000). It stated that "there is no necessary link between the amount of compensatory damages and the amount of punitive damages."¹²⁸

In short, punitive damages are available in a broad range of tort actions in Australia. While claims for such damages have increased in recent years, to date awards have been relatively modest, in part because Australian courts have insisted upon the need for restraint and moderation in awarding punitive damages.

C. *New Zealand*

Punitive damages are more widely available in New Zealand than in many other common law countries. However, the amount of such damages awarded has been significantly smaller than in other countries.

Like Australia, courts in New Zealand have explicitly rejected attempts to limit punitive damages to categories set forth by England's House of Lords in *Rookes v. Barnard*.¹²⁹ As a general policy matter, they

126. *See id.* at ¶¶ 1-24.

127. *See id.* at ¶¶ 81-94.

128. *Id.* at ¶ 95.

129. *See Rookes v. Barnard*, [1964] A.C. 1129; *see Taylor v. Beere*, [1982] 1 N.Z.L.R.

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“can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.”¹³⁰ As a result, punitive damages are available in many different arenas including defamation and personal injury, as well as in certain negligence actions.¹³¹

To determine whether punitive damages are warranted, courts look to see whether the defendant has engaged in truly outrageous conduct.¹³² Typically, punitive damages are awarded only where there has been a “contumelious disregard of the plaintiff’s rights” or some type of malice toward the plaintiff.¹³³ These requirements apply even in cases involving negligence. There, courts have stated that punitive damages are warranted only where there has been an outrageous and flagrant disregard for the plaintiff.¹³⁴

To determine the size of the punitive damages award, courts consider six factors: (1) the gravity of the defendant’s misconduct, (2) the principle that awards must be modest in size, (3) the windfall to the plaintiff, (4) the defendant’s resources, (5) the injury or loss to the plaintiff, and (6) any prior punishment of the defendant.¹³⁵

81, 1982 NZLR LEXIS 591. See also Margaret A. Vennell, *The Accident Compensation Act 1972 and Punitive Damages*, 10 N.Z. U. L. REV. 165 (1982).

130. See *Taylor*, 1982 N.Z.L.R. LEXIS at *18.

131. See, e.g., *McLaren Transport Ltd v. Somerville*, [1996] 3 N.Z.L.R. 424, 1996 NZLR LEXIS 812; *G v. G*, [1997] N.Z.F.L.R. 49, 1996 NZFLR LEXIS 42; *Television New Zealand Ltd. v. Quinn*, [1996] 3 N.Z.L.R. 24, 1996 NZLR LEXIS 788. See generally Margaret A. McGregor Vennell, *Remedies in THE LAW OF TORTS IN NEW ZEALAND* 870 (Stephen Todd ed., 1991).

132. See *Ellison v. L*, [1998] 1 N.Z.L.R. 416 (C.A. Wellington), 1997 NZLR LEXIS 635, at *9.

133. See *Taylor*, 1982 NZLR LEXIS at *41.

134. See *Ellison*, 1997 NZLR LEXIS 635; *McLaren*, 1996 NZLR LEXIS 812. For example, in *McLaren*, the plaintiff was injured when a tire the defendant was inflating exploded. 1996 NZLR LEXIS at *9. Because both s 396(1) of the Accident Insurance Act 1998 and s 319(1) of the Injury Prevention, Rehabilitation, and Compensation Act of 2001 provide compensation schemes for personal injuries and preclude suits for compensatory damages, plaintiff’s only claim against defendant was for punitive damages. The court stated that to warrant punitive damages, “[t]he level of negligence [must be] so high that it amounts to an outrageous and flagrant disregard for the plaintiff’s safety, meriting condemnation and punishment.” *Id.* at *35. The Court ruled that the defendant’s conduct warranted punitive damages because the defendant was aware of the proper pressure for inflating a tire and deliberately exceeded this. In determining the size of the award, the court concluded that NZ\$15,000 was reasonable in view of the circumstances. The court stated that an Appellate court should not interfere with the judge’s assessment of punitive damages unless it is above or below a reasonable range. Here, the court determined that the sum is reasonable and that neither party could prove that the judge erred in assessing the damages. *Id.* at *38-*39.

135. See Joanna Manning, *Reflections on Punitive Damages and Personal Injury*

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The central focus in determining the size of the award is on the gravity of the conduct. According to New Zealand courts, the amount of a punitive damages award must be proportionate to the defendant's misconduct.¹³⁶

The first factor, however, is limited by the second, which mandates that awards of punitive damages are to be modest in amount. As the Court of Appeal explained in *Ellison v. L*, "[t]he marking out and punishment of outrageous behavior can be adequately achieved by a relatively modest [punitive] penalty."¹³⁷ Thus, New Zealand courts have stated that awards of between NZ\$20,000 and NZ\$30,000 are appropriate in negligence cases when the defendant's conduct warrants punitive damages.¹³⁸

The third factor, the benefit to the plaintiff, also serves to limit the size of any punitive damages awards. It is meant to emphasize that punitive damages do not have a compensatory component in New Zealand. As a result, any amount awarded should be modest because it would result in a windfall to the plaintiff, and, in cases where the defendant is a public entity, the windfall may be at the expense of the public generally.¹³⁹

The fourth factor looks to the defendant's ability to pay the punitive damages award. Here, the focus is on the net value of the defendant's assets, debts, dependants, and income potential.¹⁴⁰ The application of this factor also can limit the size of the punitive damages award to an amount that the defendant can afford to pay.¹⁴¹

The fifth factor is the extent to which the plaintiff's injuries show the heinousness of the defendant's conduct.¹⁴² The case of *G v. G* illustrates the application of this factor. There, the plaintiff claimed she

Liability in New Zealand, 2002 N.Z. L. REV. 143, 178 (2002); Stephen Todd, *Exemplary Damages*, 18 N.Z. L. REV. 145, 188 (1998).

136. See *Ellison*, 1997 NZLR LEXIS at *9; *McLaren*, 1996 NZLR LEXIS at *36-37; *Williams v. Duvalier Investments Ltd.* [1999] D.C.R. 897 (D.C. Auckland), 1999 N.Z.D.C.R. LEXIS 15; *Abel v. Brownlee*, [2002] D.C.R. 407 (D.C. Auckland), 2002 N.X.D.C.R. LEXIS 10.

137. *Ellison*, 1997 NZLR LEXIS at *9.

138. See *L v. Robinson*, [2000] 3 N.Z.L.R. 499, 2000 NZLR LEXIS 285, at *37.

139. See Todd, *supra* note 135, at 188.

140. See *G v. G*, 1996 NZFLR LEXIS at *46.

141. See *H v. R*, [1996] N.Z.F.L.R. 224, 1995 NZFLR LEXIS 77, at *3-6. In *H v. R*, plaintiff claimed that the defendant sexual abuse resulted in physical and psychological difficulties and, as a result, NZ\$250,000 in punitive damages. Because, *inter alia*, the defendant was 88 year old man who was funding his own defense and was experiencing financial difficulties, the court awarded plaintiff NZ\$20,000. *Id.* at *11-12, *27.

142. Todd, *supra* note 135, at 190.

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was battered and abused by the defendant and sought punitive damages. The defendant admitted to hitting the plaintiff over a four year period, but argued that the attacks were in response to abuse from the plaintiff. The court ruled that the defendant's actions warranted punitive damages. In determining the size of the award, the court focused on the physical assaults, noting that acts of violence against family members are strongly condemned.¹⁴³ It stated that "outrageous behaviour might well attract a punitive response but the level of damages must to a degree take into account how much a plaintiff has or will suffer as a result of that behaviour."¹⁴⁴ Here, the plaintiff suffered physically and emotionally, including scarring on her lower back and post-traumatic stress disorder. In assessing damages, the court stated *inter alia* that the severity of the violence warrants an award of NZ\$85,000.

The sixth factor considers whether the defendant has already been punished for his or her misconduct. The Court of Appeal held and the Privy Council later affirmed that punitive damages cannot be awarded if the defendant has already been subject to a criminal proceeding for the same conduct. Punitive damages are barred in the civil action if the defendant was convicted, penalized, or acquitted. Furthermore, a claim for punitive damages must be stayed if it is likely that a criminal proceeding will result from the defendant's act.¹⁴⁵

In general, punitive damages awards in New Zealand have been significantly lower than in other countries. Awards of such damages have ranged from NZ\$10,000 to NZ\$85,000, with NZ\$31,000 being the average award.¹⁴⁶ There are three primary reasons for this practice.

143. See *G. v. G*, 1996 NZFLR LEXIS at *32-33.

144. *Id.* at *41-42.

145. See *Daniels. v. Thompson*, [1998] 3 N.Z.L.R. 22; 1998 NZLR LEXIS 99, *73-74, 80, 84. See also John Smillie, *Exemplary Damages and the Criminal Law*, 6 TORTS L.J. 113 (1998).

146. See Manning, *supra* note 135, at 180-81. Two cases where the plaintiffs received higher awards of punitive damages are *G v. G* and *Television New Zealand Ltd v. Quinn*. In the former, the punitive damages claim was for NZ\$200,000, but the court awarded NZ\$85,000. In the latter, the Court of Appeal upheld a NZ \$400,000 global award, which included a punitive element. See *G v. G*, 1996 NZFLR LEXIS at *47; *New Zealand Television Ltd.*, [1996] 3 NZLR 24, 1996 NZLR LEXIS 788, at *104. The court stated that of the NZ\$400,000, a substantial portion could possibly be attributed to compensatory and aggravated damages, but even then to make up NZ\$400,000, a large portion must be attributed to exemplary damages. However, the court was unable to say that "the sum must necessarily have been so large as to fall outside general principles and to be excessive accordingly."

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The first reason for the modest size of these awards is that the sole purpose of punitive damages in New Zealand is to punish the defendant.¹⁴⁷ In *Bottrill v. A*, the court considered whether to expand the rationale for awarding punitive damages not only to punish the defendant, but also to deter future misconduct.¹⁴⁸ The court declined to do so stating that it is “too late and inconsistent with the evolution of punitive damages in New Zealand . . . to change the focus and emphasize a general deterrence rationale.”¹⁴⁹ Thus, because the only purpose for awarding punitive damages is to punish the defendant, it has had the effect of limiting the size of awards of such damages.¹⁵⁰

The second reason for why punitive damages awards have been modest is that judges, not juries typically award such damages.¹⁵¹ In New Zealand, trial by jury in the civil arena is uncommon, except for defamation, malicious prosecution, and false imprisonment claims. One commentator notes that the highest punitive damages awards are in defamation cases.¹⁵²

The third, and perhaps most important reason, is that courts in New Zealand have consistently enforced the principle that punitive damages are to be modest in size.¹⁵³ This principle was explained in *Williams v. Duvalier Investment Ltd.*:

New Zealand courts are conservative in their approach to punitive damages reserving them for cases of truly outrageous conduct which cannot be adequately punished in any other way. They are awarded only in serious and exceptional cases. The making out and punishment of outrageous behaviour can be adequately achieved by a relatively modest penalty. It is to be remembered

147. See *A v. Bottrill*, [2001] 3 N.Z.L.R. 622 (C.A. Wellington), 2001 NZLR LEXIS 161.

148. See *id.* at *37.

149. *Id.*

150. See Manning, *supra* note 135, at 152. But see John Smillie, *Exemplary Damages for Personal Injury*, 1997 N.Z. L. REV. 140 (arguing that punitive damages have been used in the past to compensate rather than to punish and deter).

151. See Todd, *supra* note 135, at 194.

152. See Manning, *supra* note 135, at 182. See also *New Zealand Television Ltd.*, [1996] 3 NZLR 24, 1996 NZLR LEXIS 788.

153. See *Williams v. Duvalier Inv. Ltd.*, [1999], D.C.R. 897, 1999 NZDCR LEXIS 15, at *28.

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that such awards are not intended as compensation.¹⁵⁴

Because of this principle and admonitions from courts on seeking large amounts of punitive damages, the claims for such damages have been relative small as compared to other countries.¹⁵⁵

Like in other countries, New Zealand prohibits excessive awards of punitive damages. There appear to be very few cases that have been overturned on appeal on the basis that the amount of punitive damages was exorbitantly high. In *Wellington Newspapers Ltd v. Dealers Guide Ltd.*, the court set forth the test to determine when an award of punitive damages is excessive:

In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it . . . an entirely erroneous estimate of the damage to which the plaintiff is entitled.¹⁵⁶

An example of a case where an award of punitive damages was overturned by the High Court is *Duffy v. Attorney General*. There, the plaintiff was unlawfully detained by the police on suspicion of drunkenness. The jury awarded NZ\$60,000 in damages, including punitive damages (although the amount attributed to exemplary relief was not stated). The court ruled the punitive damages portion of the award was excessive. It stated that in order to overturn the jury's award, "[i]t must be plain that no reasonable jury properly applying the relevant principles could have awarded so large a sum."¹⁵⁷ The court concluded that no more

154. *Id.*

155. See *Ellison*, 1997 NZLR LEXIS at *10 ("Legal advisers should be careful not to be associated with claims for amounts of damages which on any objective view are unattainable and give the appearance of being brought in terrorem."); see, e.g., *McLaren Transport Ltd.*, 1996 NZLR at *38 (seeking NZ\$30,000 in punitive damages). See also *Sharma v. ANZ Banking Group (New Zealand) Limited*, [1992] 6 PRNZ 386, 390 (stating in response to plaintiff's claim for NZ\$900,000 in punitive damages that "the claim is simply beyond the kind of scale contemplated as acceptable in this country"); *Auckland City Council v. Blundell*, [1986] 1 N.Z.L.R. 732; 1986 NZLR LEXIS 479, *24 (stating in response to plaintiff's claim for NZ\$500,000 in punitive damages that the claim was grossly excessive and that even NZ\$50,000 would not serve the function of punitive damages). Some plaintiffs have asserted claims for punitive damages at amounts sufficient to bring their claims within the jurisdiction of the High Court. See *H v. R*, 1995 NZFLR LEXIS at *25; *G v. G*, 1996 NZFLR LEXIS 42.

156. *Wellington Newspapers Ltd v. Dealers Guide Ltd.*, [1984] 2 N.Z.L.R. 66, 72 (C.A. Wellington).

157. See *Duffy v. Attorney General* (High Court, Wellington, A 352/82, 3 February

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than NZ\$15,000 could be attributed to compensatory damages, and, therefore, the award of punitive damages totaled NZ\$45,000. The court thought that amount was excessive and was the result of the jury being faced with “a plaintiff who made a sympathetic impression, a defendant of unpopular image, and an inflammatory set of circumstances.”¹⁵⁸ The court determined that the total award, including punitive damages should not have exceeded NZ\$20,000.¹⁵⁹

Because of the efforts by New Zealand courts to control the size of punitive damages awards, one commentator notes that claims for punitive damages have become impracticable from an economic standpoint. The size of such awards typically is insufficient to cover plaintiff’s legal fees and other expenses.¹⁶⁰

D. *The United States*

The most widespread use of punitive damages is in the United States, where the award of exemplary relief is governed both by state and federal law. However, the Due Process Clause of the United States Constitution constrains unreasonably large awards of punitive damages.¹⁶¹

In the United States, punitive damages typically serve two purposes: (1) to punish a party from engaging in wrongful, malicious, or outrageous conduct, and (2) to deter that party and others from engaging in the prohibited behavior in the future.¹⁶² A few states allow what they call exemplary relief only to compensate the claimant when damages are difficult to ascertain, and not to punish the defendant.¹⁶³

Punitive damages are allowed in a great majority of states,

1986, Eichelbaum J.) at 1-2 .

158. *Id.*

159. *See id.* at 7

160. *See* Manning, *supra* note 135, at 184.

161. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

162. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); *see also* Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 197 YALE L.J. 2071, 2074 (1998). *But see* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163 (2003).

163. *See* Peisner v. Detroit Free Press, 242 N.W.2d. 775 (Mich. App. 1976), *aff’d as modified*, 364 N.W.2d 600 (Mich. 1984); *see also* Wright Titus, Inc. v. Swafford, 133 S.W.2d 287 (Tex. Civ. App. 1939).

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although the circumstances permitting such relief vary greatly.¹⁶⁴ Punitive damages have been permitted in actions involving torts, contracts, property, admiralty, employment, and family law.¹⁶⁵

Five states either prohibit the award of punitive damages altogether or severely restrict their use. Nebraska and Washington do not allow punitive damages.¹⁶⁶ Louisiana, New Hampshire and Massachusetts also prohibit punitive damages, unless they are expressly authorized by statute.¹⁶⁷

Unlike Australia and New Zealand, the majority of American states allow punitive damages where the defendant has already been subject to criminal proceedings for the same conduct giving rise to the claim for damages or where the defendant's wrongful conduct would expose him or her to criminal sanctions.¹⁶⁸ There are two justifications for this rule. The first is that the prohibition on double jeopardy¹⁶⁹ applies only to multiple criminal prosecutions and thus such actions do not preclude punitive damages.¹⁷⁰ The second is that the civil and criminal penalties serve different purposes: criminal sanctions redress a wrong to the public,

164. See generally BLATT, *supra* note 4, at 236-552.

It should be noted that States are currently divided on whether arbitrators have the authority to award punitive damages. Compare *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976) (prohibiting arbitrators from awarding punitive damages), with *Complete Interiors, Inc. v. Behan*, 588 So.2d 48, 51 (Fla. Dist. Ct. App. 1990) (stating that arbitrators may not award punitive damages absent express provision in contract authorizing this relief) and with *Baker v. Sadick*, 162 Cal. App. 3d 618, 631 (4th Dist. 1984) (ruling that arbitrators may award punitive damages unless the parties expressly prohibit its award). In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Supreme Court ruled that parties are generally free to define the scope of their arbitration agreement and that Federal Arbitration Act ensures that such an agreement will be enforced according to its terms notwithstanding state law limits on arbitrability. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55-64 (1995).

165. See 2 SCHLUETER & REDDEN, *supra* note 17, at § 20; JOHN J. KIRCHER & CHRISTINE M. WISEMAN, *PUNITIVE DAMAGES: LAW & PRACTICE* 5-1, 6-1, 13-1 (2d ed. 2000).

166. See *Miller v. Kingsley*, 230 N.W.2d 472 (Neb. 1975); *Maki v. Aluminum Bldg. Prod.*, 436 P.2d 186 (Wash. 1968).

167. See N.H. REV. STAT. ANN. § 507:16 (1986); *McCoy v. Arkansas Natural Gas Co.*, 143 So. 383 (La. 1932), *cert. denied*, 287 U.S. 661 (1932); *Karavokiros v. Indiana Motor Bus Co.*, 524 F. Supp. 385 (E.D. La. 1981); *USM Corp. v. Marson Fastener Corp.*, 467 N.E.2d 1271, 1284 (Mass. 1984). Michigan allows exemplary relief if they are compensatory in nature. See *Peisner v. Detroit Free Press, Inc.*, 364 N.W.2d 600, 603 (1984).

168. See KIRCHER & WISEMAN, *supra* note 165, at § 3:2 (citing cases).

169. See U.S. Const. amend. V (stating "nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb").

170. See *E.F. Hutton & Co., Inc. v. Anderson*, 596 P.2d 413 (Col. 1979); *Olson v. Walker*, 781 P.2d 1015 (Ariz. Ct. App. Div. 1989).

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whereas punitive damages in a civil action to redress a wrong to a private party.¹⁷¹

With respect to determining the amount of punitive damages, the practice has been to give the jury broad discretion.¹⁷² Specifically, under the traditional approach, once it is determined that the conduct justifies an award punitive damages, the jury determines the amount, “consider[ing] the gravity of wrong and the need to deter similar conduct.”¹⁷³ And, as explained below, that determination is then reviewed by the trial judge and appellate courts.

A number of states limit the amount of punitive damages that may be awarded.¹⁷⁴ For example, Alabama and Georgia place a cap on awards of punitive damages at \$250,000.¹⁷⁵ New Jersey limits punitive damages to five times compensatory damages or \$350,000, whichever is greater.¹⁷⁶ Oklahoma limits punitive damages in two out of three categories of cases:

Category I. Where the jury finds by clear and convincing evidence that . . . [t]he defendant has been guilty of reckless disregard for the rights of others . . . the jury . . . may award punitive damages in an amount not to exceed the greater of:

171. *See* Wittman v. Gilson, 530 N.E.2d 514 (NY 1988); Moody v. Payne, 355 So. 2d 116 (Ala. 1978).

172. *See* Missouri Pac. R. Co. v. Humes, 115 U.S. 512, 521 (1885) (stating, with respect to determining the amount of punitive damages, “[t]he discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice”); *see also* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 3 (2002) (finding “the instructions presented to jurors for determination of the appropriate punitive damages verdict are extremely vague and employ terms that are largely undefined”).

173. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991). Commentators also note that some states permit juries to consider in determining the amount of punitive damages to be awarded: (1) the possibility of criminal punishment, (2) the amount of compensatory damages, and (3) the expense and attorneys’ fees incurred by the plaintiff. *See* 1 KIRCHER & WISEMAN, *supra* note 165, § 5:23, at 5-175-77.

174. *See, e.g.*, IND. CODE ANN. § 34-51-3-4 (1999) (stating punitive damages may not be more than times compensatory damages or \$50,000, whichever is greater); TEX. CIV. PRAC & REM. CODE ANN. §41.008 (2001) (limiting in certain actions punitive damages to \$200,000 or two times the economic damages and up to \$750,000 in additional non-economic damages, whichever is greater); VA. CODE ANN. § 8.01-38.1 (1987) (imposing \$350,000 cap on punitive damages); *see also* NEV. REV. STAT. § 42.005(1) (1991) (limiting punitive damages in certain cases to three times the amount of compensatory damages if the compensatory damages are less than \$100,000).

175. *See* ALA CODE § 6-11-21 (1975); GA. CODE ANN. § 51-12-5.1(g) (1997).

176. *See* N.J. STAT. ANN. § 2A: 15-5.14 (1995) (limiting punitive damages to five times compensatory damages or \$350,000, whichever is greater).

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(a) One Hundred Thousand Dollars (\$100,000), or (b) the amount of actual damages awarded.

Category II. Where the jury finds by clear and convincing evidence that . . . [t]he defendant has acted intentionally and with malice towards others . . . the jury . . . may award punitive damages in an amount not to exceed the greater of:

(a) Five Hundred Thousand Dollars (\$500,000), (b) twice the amount of actual damages awarded, or (c) the increased financial benefit derived by the defendant . . . as a direct result of the conduct causing injury to the plaintiff and other persons or entities.

Category III. Where the jury finds by clear and convincing evidence that . . . [t]he defendant has acted intentionally and with malice towards others . . . and the court finds . . . that there is evidence beyond a reasonable doubt that the defendant . . . acted intentionally and with malice and engaged in conduct life-threatening to humans, the jury . . . may award punitive damages in any amount the jury deems appropriate¹⁷⁷

On the federal level, a number of statutes explicitly authorize the award of punitive relief for specific violations.¹⁷⁸ The Fair Credit Reporting Act, for example, provides that a court may award punitive damages when a consumer reporting agency willfully fails to comply with the requirements imposed by the Act.¹⁷⁹ In addition, various other statutes permit treble damages, including the Clayton Act, the Racketeer Influenced and Corrupt Organization Act (RICO), and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).¹⁸⁰ Conversely, a number of federal statutes, such as the Foreign Sovereign

177. OKLA. STAT. ANN. tit. 23, § 9.1 (West Supp. 2003).

178. See Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b) (1994); Fair Housing Act, 42 U.S.C. § 3613(c) (1994); see also *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 581-82 (5th Cir. 1982) (holding treble damages are available under antitrust laws), *cert. denied*, 459 U.S. 908 (1982); *Riley v. Empire Airlines*, 823 F. Supp. 1016, 1023 (N.D.N.Y. 1993) (permitting punitive damages in action for wrongful discharge under Railway Labor Act); *Woods v. New Jersey Dep't of Educ.*, 796 F. Supp. 767, 776 (D.N.J. 1992) (ruling that language in Individual with Disabilities Education Act authorizes claim for punitive damages).

179. See Fair Credit Reporting Act, 15 U.S.C. § 1681n (1994).

180. See Clayton Act § 4, 15 U.S.C. § 15(a) (1994); Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1964(c) (1994); Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9607(c)(3)(1994).

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Immunities Act and the Federal Tort Claims Act, expressly preclude awards of punitive damages.¹⁸¹

For over 200 years, the Supreme Court declined to place any constitutional limits on jury-awards of punitive damages.¹⁸² The Court based this hands-off policy on the historic recognition of punitive damages in the United States and England.¹⁸³ Then, starting in the mid-1990s, it issued a number of decisions limiting awards of punitive damages and setting forth procedures for courts to follow in reviewing such awards.¹⁸⁴

The first case to invalidate a jury award of punitive damages on the ground that it was grossly excessive and exceeded constitutional limits was *BMW of North America, Inc. v. Gore*.¹⁸⁵ In that case, Gore alleged that BMW committed fraud under Alabama law by failing to disclose that the new car he purchased from an authorized dealer had been damaged and repainted prior to its sale. A jury awarded Gore \$4,000 in compensatory damages and \$4 million in punitive damages, finding that BMW's actions constituted gross, oppressive or malicious fraud.¹⁸⁶ BMW appealed to the Alabama Supreme Court, which rejected BMW's claim that the award was unconstitutionally excessive. Nevertheless, it reduced the punitive damages to \$2 million, ruling that the jury improperly calculated the award

181. See Federal Tort Claims Act, 28 U.S.C. § 2674 (1994); Foreign Sovereign Immunities Act, 28 U.S.C. § 1606 (1994).

182. See, e.g., *St. Louis, Iron Mountain & Southern Ry Co. v. Williams*, 251 U.S. 63 (1919) (affirming an award of \$75 punitive damages and \$25 in attorneys' fees against a railroad that collected sixty-six cents more than the fare from two passengers); *Beckwith v. Bean*, 98 U.S. 266, 305 (1878) (upholding punitive damage award in false imprisonment action); *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1852) (affirming punitive damage award against defendants in trespass action).

183. See *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, (1885) ([I]n England and in this country, [damages] have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of."); *Day*, 54 U.S. at 371 ("It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant . . .").

184. See *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003).

185. 517 U.S. at 559.

186. See *id.* at 564-65. BMW claimed that the damage to Gore's car only amounted to \$601.37, approximately 1.5% of its list price. The jury assessed actual damages based on the statements of a former BMW dealer, who testified that the second paint job decreased the value of the BMW by 10%. *Id.*

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by basing it on BMW's conduct in other states.¹⁸⁷ The United States Supreme Court reversed.

The Supreme Court initially noted that a state may impose punitive damages to further its "legitimate interests in punishing unlawful conduct and deterring its repetition."¹⁸⁸ As a result, the Court stated that the inquiry to determine whether a punitive damages award is unconstitutionally excessive begins with identifying the interests that a punitive damages award is designed to serve. The Court determined that while Alabama had a legitimate interest in awarding punitive damages in this case – preventing manufacturers from engaging in deceptive trade practices – such damages could be imposed only within its jurisdiction. To impose economic sanctions for conduct outside the state, the Court opined, would improperly punish BMW for conduct that was lawful in other jurisdictions and that would have no effect on Alabama. The Court thus agreed with the portion of Alabama Supreme Court's decision that the jury had improperly calculated the amount of punitive damages because it based its award in large part on conduct outside the State.¹⁸⁹

The Court next turned to whether the reduced award was unconstitutionally excessive. The Court announced three guideposts to be used in reviewing punitive damages awards: (1) the degree of reprehensibility of the defendant's misconduct, (2) the ratio between compensatory and punitive damages, and (3) the difference between the punitive damages award and the penalties that could be imposed for similar conduct.¹⁹⁰

The Court noted that the first guidepost, the degree of reprehensibility, was the most important indicium of reasonableness.¹⁹¹ Applying this factor, the Court determined that BMW's conduct was not sufficiently reprehensible to justify a \$2 million punitive damages award.

187. *See id.* at 567.

188. *Id.* at 568.

189. *See id.* at 568-75. While Alabama was permitted to impose punitive damages to protect its own consumers, the basic tenets of state sovereignty forbid it to punish a corporation for its lawful conduct in other jurisdictions. *Id.* at 571. However, BMW's out-of-state conduct could be used to determine the degree of reprehensibility of its conduct. *Id.* at 573 n.20.

190. *See id.* at 575. Justice O'Connor had advocated similar criteria in *Browning-Ferris Industries of Vermont v. Kelco Disposal*, 492 U.S. 257, 297-98 (1989) (O'Connor, J., concurring in part and dissenting in part) and *TXO Prod. Corp v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting).

191. *See Gore*, 517 U.S. at 575.

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The Court explained that the harm to Gore was purely economic, as opposed to physical, and that there was no evidence of “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive.”¹⁹²

Turning to the second guidepost, the Court stated that the punitive damages must bear a reasonable relationship to the actual harm inflicted on the plaintiff.¹⁹³ While the Court refused to adopt a simple mathematical formula to determine the constitutionality of a punitive damages award, it noted that the \$2 million punitive damages award against BMW was 500 times the actual harm to Gore, and concluded that it “surely raise[s] a suspicious judicial eyebrow.”¹⁹⁴

The Court then addressed the third guidepost, which compares the punitive damages award and the sanctions that could be imposed by the state for comparable misconduct. The Court explained that, in applying this factor, a reviewing court should “accord ‘substantial deference’ to the legislative judgments concerning appropriate sanctions for the conduct at issue.”¹⁹⁵ In the instant case, the Court stated, the maximum civil penalty for deceptive trade practices in Alabama was \$2,000 – far less than the \$2 million punitive damages award. The Court also noted that “[t]he sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.”¹⁹⁶

Based on the application of the three guideposts, the Court concluded that the award was grossly excessive and exceeded the constitutional limit. It thus reversed the Alabama Supreme Court’s judgment and remanded the case for that court to decide whether to grant BMW a new trial or to independently determine a constitutionally appropriate award.¹⁹⁷

The Supreme Court clarified the *Gore* guideposts in *State Farm*

192. *Id.* at 579. The Court noted that conduct causing economic injury could be extremely reprehensible in some cases, especially when the defendant is financially vulnerable, but that BMW’s conduct in this case was not.

193. *See id.* at 580.

194. *Id.* at 582-83 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O’Connor, J., dissenting)).

195. *Gore*, 517 U.S. at 583 (quoting *Browning Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O’Connor, J., concurring in part and dissenting in part)).

196. *Gore*, 517 U.S. at 584.

197. *See id.* at 586.

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Mutual Automobile Insurance Company v. Campbell.¹⁹⁸ There, the Campbells alleged that State Farm's actions in settling an insurance claim against the Campbells constituted bad faith, fraud, and intentional infliction of emotional distress.¹⁹⁹ A jury awarded the Campbells \$2.5 million in compensatory damages and \$145 million in punitive damages. The trial judge then reduced the damages to \$1 million in compensatory damages and \$25 million in punitive damages. Both parties appealed to the Utah Supreme Court. After purporting to apply the guidelines set forth in *Gore*, that court reinstated the \$145 million punitive damages award.²⁰⁰ The United States Supreme Court reversed.

The Supreme Court began its analysis by stating that grossly excessive punitive damages violate the Due Process Clause because they further no legitimate state purpose and constitute an arbitrary deprivation of property. The Court noted that civil awards of punitive damages were of particular concern because, while they serve a purpose similar to criminal fines, the parties subject to awards of punitive damages were not accorded the same protections given to defendants in criminal proceedings. The Court further noted that because juries are often accorded wide discretion in setting the amount of the punitive damages award, there is a potential for juries to use their verdicts to express their bias against the defendants, who are often nonresidents without strong local ties.²⁰¹

The Court next turned to *Gore*'s three guideposts for reviewing punitive damages awards: (1) the degree of reprehensibility of the misconduct, (2) the ratio between actual or potential harm and the punitive

198. 123 S. Ct. 1513 (2003).

199. *See id.* at 1517-18. The case arose after Curtis Campbell caused a car accident, killing Todd Ospital and permanently disabling Robert Slusher. Ospital's estate and Slusher offered to settle for 50,000, Campbell's policy limit. Although State Farm knew the accident was Campbell's fault, they refused to settle, and proceeded to trial. The jury found Campbell entirely at fault and returned a verdict for \$185,849. State Farm thereafter refused to pay the difference between the proposed settlement amount and the jury verdict or to post a supersedeas bond so that Campbell could appeal the award. In fact, at this point, representatives for State Farm even told the Campbells to "put for sale signs on your property to get things moving." Campbell then retained his own counsel and appealed the verdict. After the appeal was denied, State Farm paid the entire judgment. *Id.*

200. *See id.* The court found that State Farm's conduct was reprehensible, would only be punished once per every 50,000 incidents, and was comparable to the various civil and criminal penalties State Farm could face. *Id.*

201. *See id.* at 1520.

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damage award, and (3) the difference between the sanctions for comparable conduct and the punitive damages award.²⁰² It then elaborated on the first guidepost. The Court stated that the defendant's reprehensibility can be determined by looking to the following factors: (i) whether the harm caused was physical or economic, (ii) whether the defendant's conduct evinced an indifference to the safety or health of others, (iii) whether the plaintiff was experiencing financial difficulty or was otherwise vulnerable, (iv) whether the conduct at issue was an isolated incident or was repeatedly performed by the defendant, and (v) whether the defendant's conduct exhibited malice, trickery or deceit. The Court explained that the existence of only one of these factors may not be a sufficient basis to award punitive damages and, if none of these factors are present, such an award would be constitutionally suspect. The Court added that punitive damages should only be awarded if the compensatory damages are inadequate to punish the defendant and deter the defendant and others from repeating it.²⁰³

While the Court found State Farm's conduct blameworthy enough to impose some punitive damages, it stated that a smaller award would satisfy Utah's dual goals of deterrence and retribution.²⁰⁴ Here, Utah was punishing State Farm not only for its actions in the state, but also for its nationwide practices, which the Court specifically ruled improper in *Gore*. Further, the jury award was incorrectly based on evidence of other conduct by State Farm that was objectionable, yet dissimilar. Therefore, because the Campbells did not present evidence of similar conduct, State Farm's reprehensibility could be properly based only on its interaction with the Campbells.²⁰⁵

The Court subsequently turned to the second guidepost and stated that courts must ensure that the punitive damages award is both reasonable and proportionate to both the amount of harm to the plaintiff and the compensatory damages recovered. As in its previous cases, the Court explicitly declined to adopt a bright-line ratio that a punitive damages

202. *See id.* at 1521 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

203. *See Campbell*, 123 S. Ct. at 1521.

204. *See id.* at 1522.

205. *See id.* at 1523 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."). The Court noted that recidivist defendants may be more reprehensible than first-time offenders, but that punitive damage awards should be limited to only the conduct charged. The Court also found that the award was erroneously based on twenty years of conduct by State Farm. *Id.* at 1524.

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award cannot exceed.²⁰⁶ However, this time the Court stated that “few awards exceeding a single-digit ratio between compensatory and punitive damages, to a significant degree, will likely satisfy due process”²⁰⁷ The Court further noted that a higher ratio may be constitutional if an especially malevolent act caused only a small amount of harm, and that a lower ratio would be constitutional if the compensatory damages are considerable. The Court suggested that if compensatory damages are substantial, then the Constitution may limit recovery to a doubling of those damages. Applying the guidepost, the Court opined there was a presumption the \$145 million punitive damages award was invalid because of the 145 to 1 ratio, because the \$1 million compensatory damages award for a year and a half of emotional distress was substantial, and because the Campbells had suffered only minor economic injuries.²⁰⁸ The Court also dismissed as improper the Utah Supreme Court’s assertion that State Farm’s substantial assets provided a basis for upholding the excessive award. The Court opined that an unconstitutional award is not justified because the defendant is wealthy.²⁰⁹

With respect to the third guidepost, the Court noted that in the past it had looked to criminal penalties that could be imposed because, among other things, they illustrate the seriousness with which the state views the misconduct.²¹⁰ The Court cautioned that this guidepost should not be taken to mean that punitive damages could be used as a substitute for

206. *See id.* at 1524. Before *Campbell*, the Court had refused to draw any line between constitutional and unconstitutional punitive damage awards, instead relying on general considerations of “reasonableness.” *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) (“We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and* potential damages to the punitive award.”); *see also* *Pacific Mut. Life Ins. Co v. Haslip*, 499 U.S. 1, 18 (1991) (“We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.”).

207. *Id.* The Court added that “[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 or, in this case, 145 to 1.” *Id.*

208. *See id.* at 1524-25. In fact, the Court noted that the compensatory award for emotional distress already contained a punitive element. *Id.* at 1525 (citing Restatement (Second) of Torts § 908, cmt. c, at 466 (1977)).

209. *See id.* at 1525. *Cf. Haslip*, 499 U.S. at 21-22 (adopting the “financial position of the defendant” as factor to determine whether a punitive damage award is reasonable); *see also* *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 463 n.28 (1993) (admitting evidence of defendant’s wealth based on “well settled law”).

210. *See Campbell*, 123 S. Ct. 1526.

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criminal punishment, which may be imposed only after proceedings where the defendant is accorded more protections and where there exists a higher standard of proof.²¹¹ The Court then noted that the comparable penalty under Utah law for State Farm's conduct was a \$10,000 fine for fraud. That amount, the Court stated, was "dwarfed" by the punitive damages award of \$145 million.²¹²

As in *Gore*, applying the guideposts led the Court to conclude that the \$145 million punitive damages award "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."²¹³

There are two other noteworthy Supreme Court decisions on punitive damages: *Honda Motor Co. v. Oberg* and *Cooper Industries v. Leatherman Tool Group, Inc.*²¹⁴ In *Oberg*, the Court held that a state's failure to provide defendants with a meaningful way to obtain postverdict judicial review of the amount of a punitive damages award violated the Due Process Clause because there was no protection against arbitrary and inaccurate adjudications that deprive a party of liberty or property.²¹⁵ In *Leatherman*, the Court ruled that whether the *Gore* guideposts have been met must be reviewed *de novo* on appeal.²¹⁶

In short, the Supreme Court's recent decisions unambiguously

211. *See id.*

212. *See id.* Previously, the Supreme Court of Utah declared that the award was comparable to similar statutory sanctions because State Farm could have lost their business license or been subject to imprisonment. The United States Supreme Court dismissed these findings as mere speculation, asserting they were erroneously based on out-of-state and dissimilar conduct. *Id.*

213. *Id.*

214. *See* *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

215. *See Oberg*, 512 U.S. at 420, 432. In that case, Oberg sued Honda after his three-wheeled all-terrain vehicle flipped, permanently injuring him. The jury awarded Oberg \$919,390.30 in compensatory damages and \$5 million in punitive damages. Because Oberg was 20% at fault, the compensatory damages were reduced to \$735,512.31. The Oregon Court of Appeals and Oregon Supreme Court upheld the award, based on an Oregon statute which prohibited judicial review of the amount of punitive damages awarded by a jury unless there was no evidence to support the verdict. The U.S. Supreme Court reversed. *Id.* at 418-19 (quoting *Oberg v. Honda Motor Co.*, 316 Ore. 263, 285).

216. *See Leatherman*, 532 U.S. at 432-43. There, Leatherman alleged that Cooper had engaged in trade dress infringement, unfair competition, and false advertising. A jury awarded Leatherman \$50,000 in compensatory damages and \$ 4.5 million in punitive damages. The district court upheld the award and the Ninth Circuit affirmed, ruling *inter alia* that the district court did not abuse its discretion when it determined that the punitive damages award was constitutional under the *Gore* test. The Supreme Court reversed. *Id.*

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illustrate that the Court is deeply concerned with both the process for awarding punitive damages as well as the size of the awards. It has held that procedural due process mandates that safeguards be in place to ensure fairness in the awarding of punitive damages. Furthermore, it has ruled that substantive due process prohibits grossly excessive awards of punitive damages. Thus, it is likely that American courts in the coming years will more closely scrutinize punitive damages awards to ensure (by United States standards) that they are reasonable and proportionate to the wrong committed.

E. *Canada*

In formulating its procedures and rules on punitive damages, Canada has often looked to the experience in other countries, particularly the United States and England.²¹⁷ The result has been that punitive damages are available in a broad range of actions in Canada, and they appear to be increasing in number and size.²¹⁸ In fact, in July 2003, a jury awarded a record CAN\$2 million in punitive damages.²¹⁹

The purpose of awarding punitive damages in Canada is to punish, deter and show the court's disapproval of the defendant's actions.²²⁰ Today, all of the provinces and territories in Canada permit the award of punitive damages. This was not always the case. Traditionally, its availability depended on whether the province or territory whose law governed the dispute adopted a civil or common law system. In the common law provinces and territories, punitive damages has been an established remedy.²²¹ By contrast, in Quebec, a civil law jurisdiction,

217. See, e.g., *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595; see also Allen M. Linden, *The American Influence on Canadian Tort Law*, 50 U.C.L.A. L. REV. 407, 419-20 (2002).

218. See *Whiten*, 1 S.C.R. at 621; Bruce Feldthusen, *Punitive Damages: Hard Choices and High Stakes*, 1998 N.Z. L. REV. 741, 742.

219. See, Stephanie Levitz and Haley Mick, *Jury Breaks Punitive Damages Record; Awards \$2 Million to Mushroom Farmer*, (July 17, 2003) at <http://www.canoe.ca/CNEWS/Canada/2003/07/17/138939-cp.html> (last visited on July 21, 2003).

220. See *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 1208 (explaining that punitive damages are awarded to punish defendant and to deter defendant and others from engaging in such conduct, and not to compensate plaintiff).

221. See S.M. WADDAMS, *THE LAW OF DAMAGES* 562-92 (1983); JOHN W. MORRISON, *THE INSURABILITY OF PUNITIVE DAMAGES* app. B (1985); Donna Lea Hawley, *Punitive and Aggravated Damages in Canada*, 18 ALTA. L. REV. 485, 492 (1980); see also H.L. Weiss Forwarding Ltd. v. Omnis [1975] 5 N.R. 511 (S.C.C.); *S. v. Mundy* [1969] 9 D.L.R. (3d) 446

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punitive damages were not awarded in private actions²²² until 1991 when Quebec revised its civil code to allow the awarding of punitive damages.²²³

Like Australia and New Zealand, Canada has declined to limit the scope of punitive damages to the categories set out in Lord Devlin's opinion in *Rookes v. Barnard*; namely cases involving abuse of power by the government, suits concerning torts committed for profit, and statutory claims which expressly allow for such damages.²²⁴ In *Vorvis v. Insurance Corp. of British Columbia*, the Supreme Court of Canada ruled, that by rejecting the categorical approach, punitive damages may be awarded in any case when the defendant's conduct has been harsh, vindictive, reprehensible, or malicious.²²⁵ In *Hill v. Church of Scientology*, it added that "punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence."²²⁶

Punitive damages are primarily awarded in actions involving intentional torts, such as defamation,²²⁷ assault,²²⁸ and false imprisonment,²²⁹ and only where the defendant has engaged in "exceptionally objectionable conduct."²³⁰ In addition, they may be

(Ont. Co. Ct.); *Parkes v. Howard Johnson Restaurants Ltd.* [1970] 74 W.W.R. 255 (B.C.S.C.); *Hedding v. Calgary* [1992] 2 Alta. L.R. (3d) 224 (Q.B.); *Epstein v. Cressey Dev. Corp.* [1992] 65 B.C.L.R. (2d) 52 (C.A.); *Mount Baker Enter. Ltd. v. Big Rig Collision, Inc.* [1990] 64 Man. R. (2d) 180 (Q.B.), *aff'd*, 68 Man. R.2d 269 (C.A.); *Thompson v. Celebration Saloons Ltd.* [1992] 104 Sask. R. 138 (Q.B.); *G.E. Cox Ltd. v. Adams* [1979] 26 N.B.R. (2d) 49 (S.C. App. Div.).

222. See G.H.L. Fridman, *Punitive Damages in Tort*, 48 CAN. BAR REV. 373, 381 n.47 (1970).

223. See Civil Code, S.Q., ch. 64, art. 1621 (Que.) (1991); see *Patenaude v. Roy* [1970] 123 D.L.R. (4th) 78; *Lancôt v. Giguère* [1991] R.J.Q. 123 (S.C.); *Ouellette v. Forgeot* [1992] R.R.A. 940 (Que.); *Samuelli v. Jouhannet* [1994] R.J.Q. 152 (S.C.).

224. See *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 1104-05.

225. See *id.* 1 S.C.R. at 1085.

226. See *Hill v. Church of Scientology*, 2 S.C.R. at 1208.

227. See, e.g., *Ross v. Lamport* [1956] S.C.R. 366; *Goodman v. Kidd* [1986] N.W.T.R. 94 (S.C.); *Kolewaski v. Island Properties, Ltd.* [1983] 56 N.S.R. (2d) 475 (T.D.).

228. See, e.g., *Moore v. Slater* [1979] 101 D.L.R. (3d) 176 (B.C.S.C.); *Karpow v. Shave* [1975] 2 W.W.R. 159 (Alta. S.C.T.D.); *Kingsmith v. Denton* [1977] 3 A.R. 315 (S.C.T.D.).

229. See, e.g., *Lang v. Burch* [1982] 140 D.L.R. (3d) 325 (Sask. CA.); *Dalsin*, 63 D.L.R. (3d) at 565; *Hayward v. F.W. Woolworth Co. Ltd.* [1979] 98 D.L.R. (3d) 345 (Nfld. S.C.T.D.). Punitive damages also have been awarded in cases involving nuisance and conspiracy. See, e.g., *Culp v. Township of East York* [1956] O.R. 983 (H.C.J.), *aff'd*, 9 D.L.R. (2d) 749 (C.A.); *McKinnon v. F.W. Woolworth Co. Ltd.* [1968] 70 D.L.R. (2d) 280 (Alta. S.C. App. Div.).

230. See *Vorvis*, 1 S.C.R. at 1104-05.

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awarded in negligence actions, but such awards are rare.²³¹ Punitive damages also are available in breach of contract cases when the injury caused to the plaintiff is an independent actionable wrong.²³²

A number of jurisdictions expressly prohibit punitive damages in survival actions on the grounds that such damages do not represent actual pecuniary loss to the deceased and would unjustly enrich the estate.²³³ Further, punitive damages may not be awarded in a claim arising out of a statutory right unless the statute expressly provides for such remedy.²³⁴

Punitive damages may also be awarded even if the defendant has been punished in a criminal action. Canadian courts treat prior criminal punishment as a factor to consider when assessing punitive damages.²³⁵ For example, in *Buxbaum v. Buxbaum*, the Ontario Court of Appeal ruled that punitive damages could be awarded even though the defendant had been sentenced to life imprisonment without the possibility of parole for 25 years for the same conduct. In that case, the defendant was found liable

231. See *Robitaille v. Vancouver Hockey Club*, [1979] 19 B.C.L.R. 158, 1979 CarswellBC 477, ¶ 85 (holding that punitive damages can be awarded for negligence); *Coughlin v. Kuntz*, [1989] 42 B.C.L.R.2d 108, 2 W.W.R. 737 (allowing exemplary damages for negligence); see also *Linden*, *supra* note 217, at 420 (stating that punitive damages in negligence cases are “still very rare”). There is a split of authority on whether the negligent conduct had to be directed at the plaintiff. Compare *Kaytor v. Lion’s Driving Range*, 35 D.L.R.2d 426, 430 (negligent conduct has to be “consciously directed against the person, reputation, or property of the plaintiff”) with *Vlchek v. Koshel*, 52 D.L.R.4th 371, 375 (“The fact that the conduct was specifically and consciously directed at the plaintiff is a factor to consider, but specific intent is not a prerequisite”).

232. See *Vorvis*, 1S.C.R. at 1107; *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595, 637-39; *Nantel v. Parisien* [1981] 18 C.C.L.T. 79 (Ont. H.C.J.); *Cornell v. Pfizer C&G Inc.* [1981] 23 C.P.C. 286 (Ont. H.C.); *Brown v. Waterloo Regional Bd. of Commrs. of Police* [1982] 136 D.L.R. (3d) 49, 37 O.R. (2d) 277 (H.C.J.); see also, Anthony J. Saunders, *Recent Developments in the Law of Punitive Damages* (presented to the March 2001 Continuing Legal Education Society of B.C. Seminar, Damages Update 2001) at <http://www.guiltyule.com/Downloads/PAP%20CLE%20Recent%20Development%20in%20the%20Law%20of%20Punitive%20Damages.pdf>. David I. Bristow, *The Art of Proving Damages for Breach of Tender*, 10 CONSTR. L. REP. (3d) 158, at § 5 (2000).

233. See SURVIVAL OF ACTIONS ACT, Alta., § 5; Nfld., § 4(6); N.B., § 5; N.S., § 3(a); P.E.I., § 5(a); Yukon, § 6(1); TRUSTEE ACT, Man., § 55(1).

234. See CANADIAN ENCYCLOPEDIA DIGEST § 38 (3rd ed. 1995); see also *Worobel Estate v. Worobel* [1988] 67 O.R. (2d) 151 (H.C.).

235. See, e.g., *Buxbaum v. Buxbaum*, [1997] O.J. No. 5166, 1997 Carswell Ont. 4922 (Ont. C.A.); *G (E.D.) v. D (S.)* [1993] 77 B.C.L.R. 2d 106 (B.C. C.A.); *Pollard v. Gibson* [1986] 1 Y.R. 167 (Y.T. S.C.); *Joannis v. Y. (D.)* [1995] 15 B.C.L.R. (3d) 224 (B.C. S.C.); *Canada v. Lukasik* [1985] 18 D.L.R. (4th) 245 (Alta. Q.B.); *Wittig v. Wittig* [1986] 53 Sask. R. 138 (Sask. Q.B.). See also Ontario Law Commission, *Report on Exemplary Damages* 13 (1991) (recommending that courts “should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant”).

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for intentional wrongdoing and negligence for injury that resulted from the plaintiff being exposed to the murder of his wife. The court, however, reduced the punitive damage award from CAN\$130,000 to CAN\$65,000 in light of the prior punishment of the defendant.²³⁶

With respect to determining the amount of punitive damages to be awarded, traditionally juries were given broad discretion in fixing the award.²³⁷ In light of increasing punitive damages awards, the Supreme Court, in *Whiten v. Pilot Insurance Co.*, stated that juries should be instructed on the function of punitive damages and the factors to be used in determining the appropriate amount of such damages. It then set forth eleven factors that juries should consider:

- (1) Punitive damages are very much the exception rather than the rule.
- (2) [Punitive damages are] imposed *only* if there has been high-handed, malicious, arbitrary or reprehensible misconduct that departs from the ordinary standard of decent behaviour.
- (3) Where they are awarded, punitive damages should be assessed is an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant
- (4) [A]ny other fines or penalties suffered by the defendant for the misconduct in question [should be taken into account].
- (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation.
- (6) Their purpose is not to compensate the plaintiff
- (7) [The purpose of punitive damages is] to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened.

236. See *Buxbaum*, 1997 Carswell Ont. at ¶ 6.

237. See *Hill v. Church of Scientology*, 2 S.C.R. at 1195-96.

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(8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives

(9) [T]hey are [to be] given in an amount that is no greater than necessary to rationally accomplish their purpose.

(10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a “windfall” in addition to compensatory damages.

(11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.²³⁸

In recent years, punitive damages awards have increased significantly in Canada.²³⁹ Before 1988, punitive damage awards were relatively modest, with the largest awards being approximately CAN\$50,000.²⁴⁰ By the mid-90s, there was one award exceeding CAN\$1 million and several exceeding CAN\$100,000.²⁴¹ However, since then, as Justice Binnie noted in *Whiten*, “the awards have multiplied and escalated in amount.”²⁴² In fact, in July 2003, a Canadian jury ordered an insurance company to pay CAN\$2 million in punitive damages for being “malicious” and “high-handed” in refusing to pay the plaintiff’s insurance claim after plaintiff’s farm burned down.²⁴³ This award is reportedly the

238. *Whiten*, 1 S.C.R. at 646 (emphasis in original).

239. *See id.* at 621.

240. *See* Bruce Feldthusen and Neil Vidmar, *Exemplary Damage Claims in Ontario: and Empirical Profile*, 16 CAN .BUS. L.J. 162 (1990). CAN\$50,000 is approximately equal to US\$35,466, based on a conversion rate of CAN\$1=US\$0.709319. *See* <http://www.xe.com/ucc/convert.cgi>.

241. *See* *Claiborne Indus. v. National Bank of Can.*, 59 D.L.R.4th 533 (1989) (Ont. C.A.); *Hill*, 2 S.C.R. at 1130; *MacDonald Estate v. Martin*, 100 Man. R2d 1 (1994) (Manitoba C.A.); *Mustaji v. Tjin*, 25 B.C.L.R.3d 220 (1996) (B.C.S.C.) *see also* Lewis Klar, *Punitive Damages in Canada: Smith v. Megafood*, 17 LOY. L.A. INT’L & COMP. L.J. 809, 822-26 (1995). CAN\$1,000,000 is approximately equal to \$709,319 and CAN\$100,000 is approximately equal to US\$70,932, based on a conversion rate of CAN\$1=US\$0.709319. *See* <http://www.xe.com/ucc/convert.cgi>.

242. *Whiten*, 1 S.C.R. at 621; *see also* Feldthusen, *supra* note 218, at 742.

243. *See* Stephanie Levitz and Haley Mick, *Jury Breaks Punitive Damages Record; Awards \$2 Million to Mushroom Farmer*, (July 17, 2003) at <http://www.canoe.ca/CNEWS/Canada/2003/07/17/138939-cp.html> (last visited on July 21, 2003). CAN\$2,000,000 is approximately equal to US\$1,418,638, based on a conversion rate of

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largest punitive damages award in Canadian history.²⁴⁴

Canadian courts have more latitude than those in many other countries with respect to reviewing punitive damages awards for reasonableness. As Justice Cory explained in *Hill*:

Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as a deterrence?²⁴⁵

In determining whether an award of punitive damages is "rational," the appellate court considers six factors. The first is whether the award is proportionate to the defendant's conduct. "The more reprehensible the conduct, the higher the rational limits to the potential award."²⁴⁶ The second consideration is whether the award is proportionate to the degree of the financial or other vulnerability of the plaintiff and the abuse of that vulnerability by the defendant. Here, the focus is on whether the amount of the award was needed to deter the defendant from exploiting vulnerable parties.²⁴⁷ The third factor is proportionate to the harm directed specifically at the plaintiff.²⁴⁸ The fourth is whether the award is proportionate to the need for deterrence. Here, a court may consider a

CAN\$1=US\$0.709319. See <http://www.xe.com/ucc/convert.cgi>.

244. *See id.*

245. *Hill*, 2 S.C.R. at 1208-09.

246. *Whiten*, 1 S.C.R. at 650-51. The level of blameworthiness can be determined from seven factors:

- (1) whether the misconduct was planned and deliberate;
- (2) the intent and motive of the defendant;
- (3) whether the defendant persisted in the outrageous conduct for over a lengthy period of time;
- (4) whether the defendant concealed or attempted to coverup its misconduct;
- (5) the defendant's awareness that what he or she was doing was wrong;
- (6) whether the defendant profited from its misconduct; and
- (7) whether the interest violated by the misconduct was known to be deeply personal to the plaintiff or a thing that was irreplaceable.

Id.

247. *See id.* at 652-53

248. *See id.* at 653-54 (stating "[i]t would be irrational to provide the plaintiff with an excessive windfall arising out of a defendant's scam of which the plaintiff was but a minor or peripheral victim").

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defendant's financial resources to the extent that (i) it shows the defendant will experience financial hardship because of the punitive damages award, (ii) it illustrates that the defendant's financial power enabled him or her to engage in the outrageous behavior, or (iii) it may "rationally" be concluded from the circumstances that a lesser award of punitive damages would fail to deter the defendant because of the defendant's financial wealth.²⁴⁹ The fifth factor is whether the award is proportionate to any civil or criminal penalties for the defendant's misconduct. Where the defendant has already been punished through civil or criminal proceedings, or is likely to face such proceedings, a court may lessen or eliminate altogether an award of punitive damages if the objectives of retribution, deterrence and denunciation have been or will be satisfied through other proceedings.²⁵⁰ The sixth consideration is whether the award is proportionate to the advantage gained by the defendant. This factor considers whether the punitive damages award is sufficient to ensure that the defendant does not profit from his or her wrongful behavior.²⁵¹

It also should be noted that, unlike the United States Supreme Court, the Supreme Court of Canada has rejected the use a ratio between compensatory damages and punitive damages as a factor to determine whether a punitive damages award is excessive. The Court explained that "that relationship . . . is not even the most relevant because it puts the focus on the plaintiff's loss rather than where it should be on the defendant's misconduct."²⁵²

As in the United States, there appears to be little uniformity among Canadian appellate courts with respect to determining what is the appropriate size of punitive damages awards.²⁵³ The degree of

249. *See id.* at 654.

250. *See id.* at 655 ("The key point is that punitive damages are awarded 'if, but only if' all other penalties have been taken into account and found to be inadequate to achieve the objective of [punitive damages].").

251. *See id.* at 656-57.

252. *Id.* at 657-58.

253. *See, e.g., Lauscher*, 1999 Carswell Sask. at *164. In that case, the plaintiff purchased a house for CAN\$88,000. It was later discovered that the house had been insulated with Urea Formaldehyde Foam, which was banned in Canada. Use of this insulation also was prohibited by the contract. The jury awarded CAN\$271,000 in damages, which included CAN\$121,000 in compensatory damages and CAN\$150,000 in punitive damages. The trial judge reduced the award to CAN\$18,900 for the reduction in the value of the house. The plaintiff appealed, arguing that the original damages award, including the punitive damages award, should be reinstated. The Court of Appeal refused to re-enter the punitive element for two reasons. First,

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inconsistency suggests that determining whether such damages are unreasonable in Canada is highly factual, based on the individual circumstances of each case.

For example, in *Whiten v. Pilot Insurance Co.*, a jury found that the defendant insurance company deliberately and in bad faith refused to pay plaintiff's claim under a fire insurance policy on the ground that the fire destroying the plaintiff's farm was caused by arson, even though the evidence showed otherwise.²⁵⁴ The jury awarded CAN\$318,252 in compensatory damages and CAN\$1 million in punitive damages. The Ontario Court of Appeal reduced the punitive damages award to CAN\$100,000, ruling this amount was sufficient to deter others and to ensure that insurance companies act with good faith.²⁵⁵ The Supreme Court of Canada reversed and reinstated the jury's CAN\$1,000,000 punitive damages award. The court applied the above factors and determined that the evidence showed the defendant had acted maliciously and vindictively in maintaining its allegation of arson for two year even though its experts had concluded the fire was accidental and that the defendant abused its superior financial position to try to force the plaintiff to abandon her claim or to settle for less than the amount owed under the policy. According to the court, the jury could have determined that the defendant's conduct was so reprehensible that it needed to send "a powerful message of retribution, deterrence and denunciation"²⁵⁶ The court concluded that based on the record the award "was not so disproportionate as to exceed the bounds of rationality."²⁵⁷

By contrast, in *Colborne Capital Corp. v. 5427775 Alberta Ltd.*, the Alberta Court of Appeal vacated a CAN\$1,000,000 award of punitive damages.²⁵⁸ In that case, Colborne sued Stampeder Exploration claiming its rights of first refusal were violated when Stampeder purchased Westar Petroleum. Stampeder counterclaimed that Colborne had engaged in a

the plaintiffs had not claimed punitive damages. Second, the court ruled that the CAN\$150,000 punitive damages award was "so inordinately high as to shock the conscience and sense of justice." *Id.* at ¶¶ 13-19. *See also* Walker v. Darcy, [1999] 117 O.A.C. 367, 1999 Carswell Ont. 457, at ¶ 5 (reducing punitive damages award from CAN\$250,000 to CAN\$5,000).

254. *See Whiten*, 1 S.C.R. at 605-14.

255. *See id.* 616.

256. *Id.* at 658-59.

257. *Id.* at 663.

258. *See Colborne Capital Corp. 542775 Alberta Ltd.*, [1999] 45 B.L.R. 2d 21, 1999 Carswell Alta 29.

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conspiracy to cause economic harm and to interfere with its interest and that those actions amounted to an abuse of process. The trial judge dismissed Colborne's claim, finding its action a sham, and awarded Stampeder CAN\$3,630,000 in compensatory damages and CAN\$1,000,000 in punitive damages. The trial judge determined that Colborne's law suit had harmed the economic interests of Stampeder and Westar, and caused uncertainty in the investment community. On appeal, the Alberta Court of Appeal reduced the compensatory damages award to CAN\$1,815,000 and vacated the punitive damages award. With respect to the latter, it ruled that the size of the award was unprecedented, amounted to a windfall for the plaintiffs, and served "no rational purpose that wasn't met by a fair calculation of compensatory damages."²⁵⁹ Interestingly, the Court of Appeal commented that the trial judge's award of punitive damages "calls up the concerns arising from some recent American runaway jury awards in cases against insured corporate entities such as *BMW of North America, Inc. v. Gore* and others. . . . This is not to say that punitive damages should be taken from triers of fact, but it only that such awards should be carefully policed, especially where relief lies elsewhere."²⁶⁰

Finally, in *Y v. C*, the plaintiff claimed that the defendant sexually abused her for seven years and verbally abused her until she reached eighteen, thus causing her to be dysfunctional in relationships.²⁶¹ The jury awarded CAN\$350,000 in compensatory damages, CAN\$50,000 for past wage lost, and CAN\$250,000 in punitive damages. The Court of Appeal reduced the compensatory damages to CAN\$250,000 and the punitive damages to CAN\$50,000. It ruled that although the jury was justified in awarding punitive damages, CAN\$250,000 was inordinately high and beyond what was needed to punish the defendant and to deter others. It ruled that the goals of punishment and deterrence had to some extent already been fulfilled by the large compensatory damages award, which included aggravated damages, and that CAN\$50,000 was thus sufficient to punish the defendant for his "callous disregard and violation of the plaintiff's rights" and to "reflect the jury's outrage of the community at the egregious conduct."²⁶²

259. *Id.* at ¶¶ 291, 294.

260. *Id.* at ¶ 291.

261. *See Y (S.) v. C (F.G.)* [1996] 26 B.C.L.R. 3d 155, 1996 CarswellBC 1646.

262. *Id.* at ¶ 68.

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In sum, like the United States, Canada permits punitive damages in both tort and contract actions. It also has witnessed an increase in large punitive damages awards.

IV. CONCLUSIONS

This study reveals that there exists no universal consensus on punitive damages. Nonetheless, it permits drawing several conclusions.

Availability. As a general rule, common law countries permit the award of punitive damages in private actions. Today, they are available in a wide variety of tort actions where the defendant has engaged in exceptionally objectionable conduct. In fact, the types of cases in which punitive damages may be claimed appears to have increased in recent years. Most importantly, in 2001, England's House of Lords discarded the rule limiting the availability of punitive damages to those types of cases where awards of such damages had been given prior to 1964. Thus, punitive damages are now available in many countries, including England, for suits based on negligence and race or sex discrimination. However, they are not awarded in breach of contract cases, except in the United States and Canada.

Claims for punitive damages also seem to be increasing in common law countries. Australia, Canada and the United States appear to have seen an overall increase in punitive damages awards.²⁶³ New Zealand has seen a greater number of punitive damages claims in personal injury cases.²⁶⁴ And the Law Commission in England anticipates an increase in punitive damages claims in defamation actions.²⁶⁵

Quantum. Countries employ a variety of methods to determine the amount of a punitive damages award. The United States gives the jury the most latitude in fixing the award. There, juries are given broad discretion to set the award at an amount appropriate to punish defendants and deter future misconduct. By contrast, other countries have identified various factors for judges and juries to use in setting the punitive damages award.

263. See *Whiten v. Pilot Ins. Co.*, [2002] 1 S.C.R. 595, 621; Second Submission by the Law Council of Australia to the Negligence Review Panel on the Review of the Law of Negligence ¶ 11.237 (Sept. 2, 2002); BLATT, *supra* note 4, at 11-16.

264. See Joanna Manning, *Exemplary Damages in Negligence: The Story of a Screening Programme*, 9 TORTS L.J. 19, 22 (2001).

265. See Law Commission Report, *supra* note 7, at ¶ 4.14.

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These factors tend to focus on the gravity of the misconduct, the wealth of the defendant, the windfall that would result to the plaintiff, the effect on the public fisc, and whether the defendant has been subject to criminal sanctions. England has employed damages brackets to provide some guidelines for awarding punitive damages in particular types of cases.

The United States has the largest punitive damages awards. This phenomena seems to be the result of a complex interrelationship of factors. One such factor may be that punitive damages are viewed as essentially “quasi criminal” and operate as “private fines” intended to punish and deter wrongdoing,²⁶⁶ and sentences and punishment for crimes in the United States are more severe than in other Western countries.²⁶⁷ Thus, there may be a correlation between imposing large awards of punitive damages and imposing severe criminal sanctions. Another consideration is that, unlike courts in other countries, American courts have not provided detailed factors and guidelines to determine the size of punitive damages awards. Factors and guidelines may deter unreasonably large awards. A third factor appears to be that, unlike some other countries, American courts have not consistently mandated that awards of punitive damages are to be modest in size.²⁶⁸

By contrast, New Zealand appears to have the smallest punitive damages awards. Unlike the United States where punitive damages in a single case can amount to millions of dollars, awards in New Zealand rarely exceed NZ\$100,000, with the average award being NZ\$31,000 (approximately US\$18,000).²⁶⁹ New Zealand’s success in controlling the size of punitive damages awards appears to be attributable to the vigorous

266. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

267. See Michael Tonry, *Parochialism in U.S. Sentencing Policy*, 45 CRIME & DELINQUENCY 48, 61 (1999) (stating that “sentence lengths have been vastly longer in the United States . . . than in other Western countries”); see also SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 3-4 (Michael Tonry & Richard S. Frase eds, 2001). Interestingly, one commentator notes that, “[i]n the United States, some of the harshest and most rigid sentencing laws have been adopted by citizen referendums.” Tonry, *supra*, at 63.

268. One commentator speculates that the practice in the United States reflects a desire on the part of juries to use punitive damages to compensate plaintiffs for expenses and injury not covered by compensatory damages and to force companies to act responsibly. T. N.M. King, *Torts in America*, 146 NEW L.J. 999 (1996). He argues that other countries have national health care systems and tighter government control over business activity which reduces the need for large damages awards. See *id.*

269. NZ\$31,000=US\$18,344.47, based on an exchange rate of NZ\$1 = US\$ 0.591757, see <http://www.xe.com/ucc/convert.cgi> (visited July 11, 2003).

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efforts by its courts to keep awards modest in size and to prevent parties from claiming large awards of punitive damages.

Excessive Awards. All countries prohibit excessive awards of punitive damages. What constitutes excessive damages, however, is unclear.

Many countries employ the formulation that an award of punitive damages is unreasonable when it is out of proportion to the circumstances of the case. That formulation, however, appears to require an intensely factual, case-specific determination made by the appropriate domestic court.

In an effort to curb large award of punitive damages, the United States and England have articulated ratios for courts to use as a guidepost in deciding whether an award is unreasonably large. In the United States, awards of punitive damages that are more than ten times the amount of compensatory damages are likely invalid.²⁷⁰ In England, the punitive damages award in most cases should not exceed three times the basic damages.²⁷¹ By contrast, Australian and Canadian courts have rejected the use of ratios on the ground that this approach places the focus on the plaintiff's loss rather than on the defendant's misconduct.²⁷²

To summarize, recent years have seen a rise in claims for punitive damages in many common law countries. As these claims have increased, so too have efforts to limit the size of punitive damages awards. To date, these efforts, as well as their success, have varied greatly. It seems likely that these efforts will continue in the coming years, particularly in countries, such as the United States, where punitive damages awards are significant.

Finally, we have not yet witnessed to a significant degree the harmonization of the laws and practices concerning punitive damages as in other areas in light of globalization. The one country where such harmonization appears to be taking place is Canada, where the courts have looked in formulating their rules and procedures on punitive damages to how other countries had dealt with these issues. The Canadian experience appears to have resulted in punitive damages being available in a wide

270. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1524 (2003).

271. *See* Thompson v. Commission of Police of the Metropolis, [1998] Q.B. 498, 518.

272. *See* XL Petroleum (NSW) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd. (1985) 155 CLR 448, 471; Whiten v. Pilot Ins. Co., [2002] 209 D.L.R. (4th) 257, 2002 Carswell Ont. 537, at ¶ 127.

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range of actions, as in the United States, and in the use of detailed factors to determine the amount of punitive damages, as in England, Australia and New Zealand. It is also of interest that, as in the United States, punitive damages awards in Canada have increased significantly in recent years.

Notwithstanding the Canadian experience, it appears that the push toward globalization may have highlighted the differences between countries on punitive damages, particularly the disparity between the size of awards in the United States and in other countries. For example, the United States was unable to conclude a bilateral judgments recognition treaty with the United Kingdom primarily because British insurance and manufacturing interests objected to the recognition of antitrust awards, excessive American jury verdict and punitive damages awards.²⁷³ Similarly, whether other countries would agree to enforce American punitive damages awards has been labeled “one of the most difficult make-or-break issues” in drafting the proposed Hague Convention on the Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.²⁷⁴ Even with efforts by United States courts, particularly the Supreme Court, to rein in unreasonably large awards, it seems unlikely in the near future that the gap between the size of punitive damages awards in the United States and in other countries will close in any meaningful way.

273. See Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT’L L. 111, 113 (1998); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 274 (1994).

274. See Louise Lussier, *A Canadian Perspective*, 24 BROOK. J. INT’L L. 31, 69 (1998). After much study and debate, a compromise was then reached pursuant to which punitive damages would be recognized at least to the extent that similar or comparable damages could have been awarded in the State addressed. See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Adopted by the Special Commission on 30 October 1999, art. 33, available at http://www.state.gov/www/global/legal_affairs/991030_forjudg.html. Several countries subsequently backed away from this compromise. See Marc E. Hankin, *Proposed Convention Would Help IP Owners*, NAT’L L.J. C20 (Jul. 23, 2001); see also Elaine Massock et al., *Recent Developments in International Tort and Insurance Law and Practice*, 34 TORT & INS. L.J. 519, 539 (1999) (“The existence of noncompensatory or excessive damages in U.S. judgments continues to be a dilemma” in the Hague foreign judgments convention meetings.). The most recent Report on the Work of the Informal Working Group on the Judgments Project, 25-28 March 2003, available at ftp://ftp.hcch.net/doc/jdgm_pd22e.doc, indicates that issues relating to the recognition and enforcement of foreign punitive damages awards remain unresolved. See *id.* at 26.